SELECTION OF LEADING CASES

Law of Transfer Inter Vivos

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PART IV.

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TABLE OF CONTENTS.

Selection of Leading Cases.

IV.

LAW OF TRANSFER OF PROPERTY.

BELLAMY

v.

SABINE.*

[*Reported in 1 De G. & J., 566.*]

The facts of the case were as follows :—

1857.
August, 1.

In 1827, John Bellamy, the plaintiff in the present suit, was entitled to real estates at Corscombe and South Perrott for life, with remainder to his son Edward Bellamy in tail, and was seised in fee of an estate at Cheddington. The South Perrott estate consisted of two parts, referred to in the judgment of the Lord Chancellor as "the Manor Farm" and "Villabent."

By a deed, dated 8th June, 1827, made between John Bellamy and Edward Bellamy, it was agreed that the Corscombe, South Perrott and Cheddington estates should be assured to Edward Bellamy for an estate of fee simple in possession, and that Edward Bellamy should pay certain debts of John Bellamy, pay certain sums for the benefit of John Bellamy's younger children, secure to him an annuity of 210*l* for his life, and demise to him the Cheddington property for a term of years determinable on his death, and pay certain other annuities.

By articles of agreement dated 21st June, 1827, indorsed on the above deed, and made between Edward Bellamy and Thomas Sabine, Edward Bellamy, in consideration of Sabine's undertaking to pay the debts, sums of money, and annuities, which Edward Bellamy had by the deed undertaken to pay, and for other considerations, agreed to convey all the above properties to Sabine, subject to the agreement for the lease of the Cheddington property to John Bellamy.

* *Before the Lord Chancellor Lord Cranworth and the Lords Justices.*

1857.
Bellamy v. Sabine.

In pursuance of these agreements, the Corscombe and South Perrott estates were, by indentures of lease and release of the 15th and 16th November, 1827, and by common recoveries suffered in pursuance thereof, limited to the common uses to bar dower in favour of Sabine.

On 4th August, 1828, Edward Bellamy died intestate, leaving his brother Francis Bellamy his heir-at-law.

On 23rd February, 1829, Sabine mortgaged the Corscombe estate to Davis to secure 3,000*l*; and on 13th July, 1830, he mortgaged the Manor Farm to Thomas Brickenden to secure a like sum. No question arose as to either of these mortgages, which were admitted to be the first incumbrances on the estates comprised in them.

On 26th July, 1830, Francis Bellamy, who before the recoveries were suffered was tenant in tail of the Corscombe and South Perrot estates in remainder immediately expectant on the estate tail of Edward Bellamy, and was also his heir-at-law, filed his bill against Sabine, John Bellamy, and others, impeaching the agreements of 1827 as fraudulent, and praying that they, and all deeds executed in pursuance of them, might be cancelled; and that, if necessary, the Corscombe and South Perrott estates might be re-conveyed to the uses to which they originally stood limited.

By indentures of lease and release of the 14th and 15th November, 1833, Sabine mortgaged the South Perrot estate (subject as to the Manor Farm to Brickenden's mortgage) to Brickenden and Good to secure 800*l*. This was the mortgage as to which the present question arose, and it was taken by Brickenden and Good without any notice of the agreement of 8th June, 1827, or of the pendency of Francis Bellamy's suit, to which they were never made parties. Good afterwards died, and at the time when the present appeal was heard, Brickenden was solely entitled to this mortgage in trust for John Batten; but as nothing turned on this alteration of ownership, it is thought most conducive to clearness to speak throughout of the owners of this mortgage as "Brickenden and Good."

The suit of *Francis Bellamy* v. *Sabine* afterwards came on to be heard before Lord Cottenham, then Master of the Rolls, and by his decree, dated the 8th of May, 1835, the bill was dismissed so far as it sought to have the agreement of the 8th of June, 1827, and all conveyances executed in pursuance of that agreement, delivered up to be cancelled; but it was declared that the agreement of 21st June, 1827, was fraudulent and ought to be cancelled, and that the conveyances to Sabine in pursuance of that agreement were also fraudulent and ought to be cancelled. Accounts were

directed of what Sabine had paid upon the footing of this agreement, and of what he had laid out in lasting improvements on the property. An account of rents and profits was directed against him as a mortgagee in possession, and it was ordered, that on Francis Bellamy paying to Sabine the balance which should be found due to him on the result of the accounts, Sabine should convey to Francis Bellamy, or as he should appoint, the South Perrott and Corscombe estates subject to the mortgages subsisting thereon at the date of the agreement of 21st June, 1827, but free from all incumbrances created by himself.

By indenture dated 18th May, 1835, an outstanding term created in 1824 in the South Perrott estate was assigned to a trustee for Brickenden, and Brickenden and Good, for better securing the sums due to them on their respective mortgages.

By indenture dated 20th November, 1835, made between Sabine of the first part, Davis of the second part, Brickenden of the third part, Brickenden and Good of the fourth part, and John Batten and Joseph Stone of the fifth part, Sabine assigned to Batten and Stone all moneys coming to him under the decree of the 8th of May, 1835, upon trust to apply the same in payment of the moneys due to Davis, Brickenden, and Brickenden and Good, on their respective mortgages.

On 15th March, 1839, John Bellamy filed his bill against Sabine, Davis, Brickenden, Good, Francis Bellamy and others, praying for the specific performance of the agreement of 8th June, 1827, so far as it remained unperformed, and for an account of what was due to him on the footing of that agreement; that the amount might be paid to him by the defendants, or raised by sale or mortgage of the premises comprised in the agreement; and that the lease of the property at Cheddington might be executed, and the annuities secured on the estates, according to the agreement.

On 8th November, 1847, this cause was heard on appeal before Lord Cottenham (1) and by decree of that date, specific performance of the agreement of 8th June, 1827, was decreed,—accounts were directed for the purpose of ascertaining what was due to the plaintiff upon the footing of that agreement,—inquiries were directed as to the premises comprised in the several mortgages; and it was declared that, without prejudice to any question in the cause as to the priority of the respective liens, charges, and incumbrances of the plaintiff, Davis, Brickenden, and Good, upon the estates and

(1) 2 Phill. 425.

1857.
Bellamy
v.
Sabine.

premises comprised in the agreement of the 8th June, 1827, the plaintiff had a lien, and was entitled to rank as an equitable incumbrancer upon all the said estates and premises in respect of what should be found to be due to him, and to have the annuities secured upon competent parts of the said estates and premises; and the accounts, directed by the decree of the 8th May, 1835, were ordered to be carried on and prosecuted. A report was made in pursuance of this decree, but was imperfect, as it did not embrace the accounts directed by the decree of 1835, and therefore, by an order on further directions, dated 20th December, 1852, made in the two suits, those accounts were directed to be prosecuted, and by consent of all parties it was ordered, that the priorities of the respective liens, charges, and incumbrances of the plaintiff, Davis, Brickenden, Good, and others, should be ascertained.

The Chief clerk, in pursuance of this order, made his certificate, dated the 4th May, 1855, by which he certified that there was due to Sabine £ 7,855 *2s. 9d.* That the priorities were as follows, *viz.*, that Davis was the first incumbrancer on the Corscombe estate; that Brickenden was the first incumbrancer on so much of the South Perrott estate as was comprised in his security; that the plaintiff John Bellamy was the first incumbrancer on so much of the South Perrott estate as was not comprised in Brickenden's security; and the second incumbrancer on Corscombe, and on so much of South Perrott as was comprised in Brickenden's security; that Sabine was, in respect of the £ 7,855 *2s. 9d.* found to be due to him, the third incumbrancer on Corscombe and the last-mentioned part of South Perrott estate, and the second incumbrancer on so much of South Perrott as was not comprised in Brickenden's security; but that, by virtue of Sabine's assignment of November, 1835, Brickenden and Good were entitled to what was due to him, and that they were not otherwise entitled to any liens, charges, or incumbrances upon the estates.

Brickenden and Good moved before Vice-Chancellor Wood to vary the certificate, so that they might be ranked as first incumbrancers on such part of the South Perrott estate as was not comprised in Brickenden's mortgage, and as second incumbrancers on such part of that estate as was comprised in his mortgage. The Vice-Chancellor refused the motion with costs, and by his order on further consideration carried out the Chief clerk's certificate.

Brickenden and Good appealed from the order made on the motion, and from so much of the order on further consideration as carried out the same principle.

1857.
Bellamy v. Sabine.

THE LORD CHANCELLOR, after stating the facts of the case, except the suit of *Francis Bellamy* v. *Sabine* proceeded as follows:

Upon the documents and transactions which I have stated, supposing that I had stated all which affects the case, there could be no doubt but that Davis was the first mortgagee on Corscombe, Brickenden the first mortgagee of that part of South Perrott which I have designated by the name of the Manor Farm, and Brickenden and Good the first mortgagees of the rest of South Perrott, which I have called Villabent, and second mortgagees of the Manor Farm. But the plaintiff claims to have priority over Brickenden and Good, by reason of certain proceedings in this Court, to which I have not yet adverted.

After the death of Edward Bellamy in August, 1828, Francis, who, as I have already stated, was his brother and heir, filed a bill in this Court against Thomas Sabine, John Bellamy, and the other parties who took benefits under the deed of the 8th day of June, 1827, and by that bill he prayed to set aside both the instruments of June, 1827, (*i.e.*, the deed of the 8th of June, whereby the plaintiff agreed to sell to Edward, and the agreement of the 21st day of June, whereby Edward agreed to sell to Thomas Sabine), alleging by his bill, that both these instruments were obtained by fraud. This bill was filed in July, 1830, and the cause was pending in the month of November, 1833, when Brickenden and Good advanced their £ 800, and took their mortgage of South Perrott, and the question for our decision is, as to the effect of that pending suit on this mortgage.

The cause was duly prosecuted, and a decree was pronounced on the 8th day of May, 1835, dismissing the bill, so far as it sought to impeach the deed of the 8th day of June, 1827, but declaring that the agreement of the 21st June, 1827, whereby Edward agreed to sell to Thomas Sabine, was fraudulent and void, and that the deeds, whereby that agreement was carried into effect, and the estates were conveyed to Thomas Sabine, were also fraudulent and void, and ought to be delivered up and cancelled. Accounts were directed of the sums paid by Sabine in pursuance of the agreement of the 21st day of June, 1827, and on the other hand of the net rents and profits come to his hands; and it was ordered, that on payment by Francis Bellamy to Thomas Sabine of what should be found due to him on taking those accounts, he (Sabine) should convey to Francis Bellamy the whole of the property free from all incumbrances created by him. Sabine soon afterwards assigned the whole of what should be coming due to him on taking these accounts

1857.
Bellamy v. Sabine.

to trustees for the better security of his mortgagees according to their respective priorities.

The accounts thus directed do not appear to have been prosecuted, but in the decree subsequently made in the suit instituted by the present plaintiff, John Bellamy, in March, 1839, it was specially provided that the accounts, directed in the prior suit should be taken in that subsequent suit.

These accounts were accordingly taken in that suit, and a large sum, of between seven and eight thousand pounds was found due to Thomas Sabine from the plaintiff, in respect of what he had paid in discharge of the obligations under which he had come by the agreement of the 21st day of June, 1827. It was stated that the money thus payable to Thomas Sabine, would be more than sufficient to satisfy all the three mortgages. But the mortgagees have no means of compelling Francis Bellamy to prosecute his demand against Sabine, and to pay the money found due to Sabine, out of which their demands might be satisfied.

No question was or could be raised as to the priority of the two first mortgages, *i.e.* the mortgage of Corscombe to Davis for £ 3,000 and of the Manor Farm to Brickenden for £ 3,000. These mortgagees claimed by conveyance from Sabine, at a time when he was owner of the fee, and when no doubt had been cast on the validity of his title as a purchaser from the plaintiff and his son Edward. But, as to Brickenden and Good, it was argued, that their title was founded on a mortgage made in 1833, when the suit of Francis, instituted in 1830, was pending, which suit gave distinct notice that Sabine's title was subject to a claim by the plaintiff, in the nature of a lien for unpaid purchase-money. The plaintiff, John Bellamy, contended that when the title of Brickenden and Good accrued in November, 1833, he had an equitable claim on the estate of Sabine, their mortgagor, of which, from the pendency of the suit of Francis Bellamy, they must be deemed to have had notice. The Vice-Chancellor considered this claim to be well founded and decreed accordingly. I cannot concur in this view of the law.

It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party.

1857.
Bellamy
v.
Sabine.

Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had, or had not, notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before final decree to a person, who had no notice of the pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence. Thus, in the present case, it is certain, that though Brickenden and Good were entirely ignorant of any right on the part of Francis Bellamy to question the title which Sabine derived under Edward, yet as their mortgage was made to them by Sabine after the institution of the suit of Francis, questioning Sabine's title, and while it was pending, they cannot set up against Francis any right from which Sabine, their mortgagor, was excluded by the decree. Their title was good against Sabine, and so may be asserted against whatever money is coming due to him under the decree, but against Francis, the plaintiff, they can be in no better position than Sabine himself.

This proposition is not disputed, but John Bellamy, the plaintiff, contends further, that not only did the pendency of the first suit prevent Brickenden and Good from insisting against Francis on their mortgage, but that, inasmuch as the proceedings in that suit gave notice of his, the now plaintiff's, equitable rights under the deed of the 8th day of June, 1827, therefore they took their mortgage subject to those rights. I have already stated that for this argument I can discover no warrant. Of course, if they had had notice of the suit, the case might be different. Notice of the equitable claim, insisted on by the plaintiff, would prevent them from setting up a legal title against that claim, and whether the notice came to them by means of their being made aware that a suit was pending in which the right appeared, or by any other means, would be immaterial. But in such a case the legal title would be affected, not by reason of there being a *lis pendens*, but by reason of the mortgagees having notice of a claim appearing in a *lis pendens*, and here there is no suggestion that any such notice existed.

That this is the true doctrine as to *lis pendens*, appears to me to be not only founded on principle, but also consistent with the authorities.

1857.

Bellamy v. Sabine.

Thus in *Culpepper* v. *Aston*, (1), lands had been devised to a trustee to sell for payment of debts. The heir filed his bill against the trustee, alleging that the real estate was not wanted for the debts, and, therefore, praying for a conveyance. It was held, that a sale by the trustee *pendente lite* did not bind the heir. This decision was clearly right. So, in *Sorrell* v. *Carpenter* (2), the plaintiff had instituted a suit against one Ligo on a claim, which by the decree he had established, to certain lease-hold estates. Pending the suit, Ligo sold to the defendant, and the question was, whether the defendant Carpenter could sustain his purchase. Lord King was clear that he could not, though on some formal grounds the bill in that case was dismissed. In both these cases the doctrine really was that, pending a litigation, the defendant cannot by alienation affect the rights of the plaintiff to the property in dispute, and the same principle is applicable against a plaintiff, so as to prevent him from alienating to the prejudice of the defendant, where, from the nature of the suit, he may have in the result a right against the plaintiff, as on a bill by a devisee to establish a will against an heir, if in the result the devise is declared void, the heir is not to be prejudiced by the alienation of the devisee (plaintiff) *pendente lite*. See *Garth* v. *Ward*. (3)

The language of the Court in these cases, as well as in *Worsley* v. *The Earl of Scarborough* (4), certainly is to the effect that *lis pendens* is implied notice to all the world. I confess, I think that is not a perfectly correct mode of stating the doctrine. What ought to be said is that, *pendente lite*, neither party to the litigation can alienate the property in dispute so as to affect his opponent. The doctrine is not peculiar to Courts of Equity. In the old real actions the judgment bound the lands, notwithstanding any alienation by the defendant *pendente lite*, and certainly that did not depend on any principle arising from implied notice.

After all, it would not be material in what form the principle is enunciated, were it not that by treating the question as one of implied or constructive notice, we incur the risk of pushing the doctrine beyond its legitimate limits. This has, I think, been done in the present case. If the doctrine really rested on the ground of implied notice, the consequence might be that the person affected by notice is affected by notice of everything reasonbly deducible from or appearing in the suit, and this might warrant the order now

(1) 2 Ch. Cas., 115, 221.
(2) 2 P. Wms, 482.
(3) 2 Atk., 174.
(4) 3 Atk., 392.

complained of. I am, however, of opinion, that the pendency of Francis Bellamy's suit cannot be treated as having amounted to notice of the equitable rights of John Bellamy against his co-defendant, Sabine.

The certificate of the Chief clerk, and the order consequent thereon, ought therefore to be varied, by making those now claiming in right of Brickenden and Good, in respect of the mortgage for £800, first incumbrancers on so much of South Perrott as is not subject to the mortgage for £3,000 to Brickenden, and second mortgagees of what is so subject.

THE LORD JUSTICE KNIGHT BRUCE.—There is no question of priority here between the appellants and Francis Bellamy, the plaintiff, in the first suit. The appellants, claiming under the security of 1833, admit that it conferred no better title on the mortgagees of 1833 as between them and Francis Bellamy than it would have conferred, if the mortgagees of 1833 had taken it with express notice of Francis Bellamy's rights against Sabine. The controversy is between the appellants and John Bellamy, and its decision, depends on the effect, if any, which, between John Bellamy and the appellants, the suit instituted by Francis Bellamy, in 1830, had on the transaction of 1833.

In that suit, the only suit which in or before 1833 existed, Francis Bellamy was the sole plaintiff, and neither of the mortgagees of 1833 a defendant, nor does there appear to have been, in or before 1833, any decree or material order in the cause; consequently, in my opinion, there was not a *lis pendens* created by it, at least in or before 1833, between John Bellamy and Thomas Sabine, who were both defendants in the cause, or between John Bellamy and the mortgagees of 1833; and as those mortgagees, respectively, had neither in nor before the year 1833 actual notice, so, in my judgment, as between them and John Bellamy, neither in nor before that year, had either of them constructive notice of the suit of 1830. John Bellamy, in and before the year 1833, stood, so far as any litigation was concerned, on the defensive merely. John Bellamy was not in any sense an actor in any litigation before the year 1835.

There is therefore nothing, as I conceive, to prevent the appellants, as to the property comprised in their security, the legal estate in which is under their control from saying effectually, as they aver truly against John Bellamy, that the mortgagees of 1833 took from Thomas Sabine the security of that year, without notice of the deed of the 8th of June, 1827.

1857.
Bellamy v. Sabine.

The security therefore of 1833 is, in my opinion, as to the property in which the legal estate is under the appellants' control, of higher rank than the claims of John Bellamy, under the deed of the 8th of June, 1827. How the case would have stood, had the appellants been claiming anything under any act done by Francis Bellamy, after the commencement of the suit of 1830, it is immaterial to consider, for the appellants are not, nor have been so claiming anything.

I may add, that the Lord Justice Turner having been so good as to remind me of an ordinance of Lord Bacon, and a General Order of 1649, showing, to some extent at least, the effect which a *lis pendens* was held by this Court to have in the 17th century, I have not failed to consider them; but, with much deference to my learned brother, if he thinks otherwise, I am not of opinion that they affect or bear upon the present controversy.

THE LORD JUSTICE TURNER.—The decision of the Vice-Chancellor in this case, giving priority to the plaintiff, John Bellamy, over Brickenden and Good, the mortgagees of Sabine, rests wholly upon the doctrine of *lis pendens*. The only *lis pendens* at the time when the mortgage to Brickenden and Good was made was the suit instituted by Francis Bellamy, the heir of Edward Bellamy, against the now plaintiff, John Bellamy, and against Sabine and other parties, for the purpose of setting aside the agreement of the 8th of June, 1827, by which John Bellamy sold, to Edward Bellamy, and the agreement of the 21st of June, 1827, by which Edward Bellamy, sold to Sabine. Francis Bellamy did not succeed in impeaching the agreement of the 8th of June, 1827. The bill, so far as it sought to impeach that agreement, was dismissed. Except with respect to that agreement, there was no question to be decided in that suit between Francis Bellamy and the then defendant and now plaintiff, John Bellamy; nor so far as I can see, was there any question which could be reached in that suit between John Bellamy and Sabine, at all events so as to affect the right of the plaintiff, Francis Bellamy. The decree in the suit seems to me to show that this was the case, for Sabine was ordered to convey to Francis Bellamy on payment of what should be found due to him. The equities between John Bellamy and Sabine were treated as being left, and were left, to be decided in a future suit. Nevertheless, the Vice-Chancellor, whose opinions are always entitled to the highest consideration, was of opinion that this suit of Francis Bellamy's constituted a *lis pendens*, which affected Brickenden and

1857.

Bellamy v. Sabine.

Good, the mortgagees of Sabine. He seems to have considered that, consistently with the doctrine of *lis pendens*, the appellants could in no case be entitled to stand in any better position than Sabine,—land that their title must stand or fall with his. I am not prepared to follow the decision to this extent. The doctrine of *lis pendens* is not, as I conceive, founded upon any of the peculiar tenets of a Court of Equity as to implied or constructive notice. It is, as I think, a doctrine common to the Courts both of Law and of Equity, and rests, as I apprehend, upon this foundation,—that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding. That this doctrine belongs to a Court of Law no less than to Courts of Equity, appears from a passage in 2nd Inst. 375, where Lord Coke, referring to an alienation by a mesne lord pending a writ, says that the alienee could not take advantage of a particular provision in the statute of Westminster the Second, because he came to the mesnalty *pendente brevi*, and in judgment of law the mesne *as to the plaintiff* remains seised of the mesnalty, for *pendente lite nihil innovetur* ; and though Lord Bacon's Orders, which give the rule in equity, are very generally expressed, the language of the order upon this subject being : " No decree bindeth any that cometh in *bona fide* by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill nor order ; but where he comes in *pendente lite*, and while the suit is in full prosecution, and without any colour of allowance or privity of the court, there regularly the decree bindeth ;" this order must, I think, be understood to mean that the decree binds so far as the title of the plaintiff is concerned, for the context of the order seems to me to show that it was the title of the plaintiff only which was contemplated by it. We have, therefore, Lord Coke expressly pointing to the title of the plaintiff as what is to be protected by the doctrine of *lis pendens*, and Lord Bacon apparently not extending the protection further. On examining, too, the subsequent cases, I have not found any authority for carrying this doctrine to the extent to which this decision has gone. No case, so far as I am aware, has yet occurred in which the doctrine has been applied so as to affect the title of the alienee of a defendant by virtue of a claim not interfering with the title of the plaintiff in the pending litigation. What is

1857.

Bellamy v. Sabine.

said in the cases of *Worsley* v. *Lord Scarborough* (1) and *Mead* v. *Lord Orrery* (2) and also in *Metcalfe* v. *Pulvertoft* (3) seems to me to tend the other way. I regard this decision, therefore, as one of the first impression, and it is plainly one of the utmost importance.

John Bellamy and Sabine were co-defendants in the suit, which was pending when the alienation to Brickenden and Good was made, and the effect of the decision is to cut down the title of Sabine's alienee in favour of his co-defendant John Bellamy. Generally speaking, between co-defendants there can be no decree,—is it to be said that there is a *lis pendens* between them? If so, when did it commence? The service of the *subpœna* constitutes a *lis pendens* between the plaintiff and defendant; but when is the *lis pendens* between co-defendants to commence? This is one of the difficulties which would arise from this extension of the doctrine, but the difficulties to which the extension of the doctrine would lead are but of little importance when compared with the consequences which would result from it. If this decision be right, and an alienee of a defendant is, by virtue of this doctrine of *lis pendens*, to be affected by the claim of a co-defendant, upon what principle is the alienee to be protected from the claim of a mere stranger? Laying out of consideration the cases in which decrees can be made between co-defendants, (which are rare, and for the most part go no further than where it is necessary for the purposes of the plaintiff to adjudicate between the defendants,) upon what ground is the case of a co-defendant to stand in a different position from that of a stranger? And if the doctrine of *lis pendens* is to be carried so far as to affect a purchaser with notice in favour of a stranger, I hardly know what title would be safe, independently of the late acts requiring registration.

Of course the observations which I have made are not to be taken as importing that the alienee of a plaintiff will not be bound as much as the alienee of a defendant, or to have any reference to cases where there is notice independently of the *lis pendens*, or to cases in which the rights of the plaintiff may require that there should be an adjudication between the defendants; but in this case no notice is proved independently of the suit, and I see nothing to show that the rights of Francis Bellamy, the plaintiff in the suit which was pending when this alienation was made, could render it necessary for the interest of Francis to decide any question of right

(1) 3 Atk., 392. (2) 3 Atk., 243.

(3) 2 Ves. & B., 200.

between John Bellamy and Sabine. I am of opinion, therefore, that this decision cannot be supported, and that the order must be varied by declaring the priorities according to the notice of motion on the part of the defendants, Brickenden and Good.

1857.
Bellamy v. Sabine.

NOTE :—This case is the leading authority upon the doctrine of *lis pendens* which is now codified in Sec. 52 of the Transfer of Property Act. The principle on which the doctrine rests is that no alienation of the subject-matter of a pending litigation by either party thereto is to be allowed to prejudice the intersts of the parties [*Nathaji* v. *Nana*, 9 B. L.R., 1173]. The doctrine does not apply to *moveables*, *Wigram* v. *Buckley*, (1894) 3 Ch., 483 ; *Punithavelu* v. *Bhashyam*, I.L.R , 25 Mad., 406 (422). In the recent case of *Faiyaz Hussain* v. *Munshi Bag*, L.R. 34 I. A. 102 ; 5 C. L. J , 563 ; I.L.R., 29 All., 339, the Judicial Committee laid down that a suit contentious in its origin and nature is contentious within the meaning of Sec. 52 of the T. P. Act from the very commencement and service of the summons is not a condition precedent, to make it a contentious suit within the meaning of the section. See also, *Krishnappa* v. *Shivappa*, I.L.R , 31, Bom., 393.

Three conditions must exist in order to make Sec. 52 of the Transfer of Property Act, applicable :

1. The suit must be one in which a right to immoveable property is directly and specifically in question.

2. The suit or proceeding must be contentious.

3. The suit must be in course of active prosecution. The applicability of the section depends on the state of things existing when the transfer is effected.

It is open to the court, however, to authorize a transfer *pendente lite* and to fix the terms on which it may be made. The purchaser who takes under a transfer so made does not of course come within the operation of the *rule*.

There has been some difference of opinion as to whether transfers by operation of law or in execution of decrees or orders are within the purview of the Act. The view which is now generally accepted is that the doctrine of *lis pendens* does apply even in such cases. See, *Dinonath Ghose* v. *Shama*, I.L.R., 28 Calc., 23 ; *Moti Lall* v. *Karabuddin*, I.L.R., 25, Calc., 174 ; L. R , 24, I. A, 170 ; *Kedar* v. *Muthu Krishna*, I L.R., 26, Mad , 230 ; and *Raj Kishore* v. *Jadunath*, 11 C.W.N., 828.

The rule also applies to purchasers at revenue sales when such sales do not pass the property to the purchaser free from all encumbrances *Harshanker* v. *Shew Gobind*, I.L.R., 26 Calc., 966 ; *Bhowani* v. *Mathura*, 7 C.L.J , 1.

In the case of mortgage suits, it has been held that the *lis* continues after the decree nisi and the doctrine of *lis pendens* is applicable to proceedings to realise the mortgage after the decree for sale. *Surjiram* v. *Earhamdto*, 2 C.L.J., 288 ; *Parsotam* v. *Chheda Lal*, I.L.R , 29 All., 76.

RAJKISHEN MOOKERJEE

v.

RADHA MADHUB HOLDAR.*

[*Reported in 21 W. R., 349.*]

1874.
March, 11.

The following judgment was delivered by

COUCH, C. J.—In this case the suit was brought by the plaintiff for rent of certain property which had been sold by auction in satisfaction of a money-decree against Matunginee Dabee and purchased by the plaintiff. The plaintiff alleged that the defendant was in possession of the property under a *putnee* in the name of his son, and sought to recover the rent with interst for a period commencing at the date of his purchase.

The defendant admitted that he was in possession of the property, but alleged that the relation of landlord and tenant did not exist between him and the plaintiff; that the plaintiff had never taken possession of the property which he purchased; that it was mortgaged to the defendant, and that the defendant obtained a decree for the money due on the mortgage, and purchased the property himself at the sale in execution of the decree; and therefore the plaintiff was not entitled to receive the rent which he claimed.

The Subordinate Judge who first tried the suit, after stating what the defendant urged by way of defence, did not enquire into it but determined that the defendant was responsible to the plaintiff for the rent until the question of the right set up by him was adjudicated upon in a regular suit.

Upon the appeal, the Officiating Judge said:—"The third point is that the defendant having a mortgage on the property obtained a decree, brought it to sale, and purchased it himself, thus becoming *malik* as well as *putneedar*. The full consideration of this would involve several somewhat intricate questions of right and law which cannot be properly decided in a rent-suit, and into which it is therefore unnecessary to enter."

Both Courts, therefore, avoided deciding what was the real question between the parties. Instead of finally determining the

* *Present*,—The Hon'ble Sir RICHARD COUCH, Kt., Chief Justice, and the Hon'ble F. A. GLOVER, Judge.

1874.

Rajkishen Mookerjee v. Radha Madhub Holdar.

matter in dispute, they left it to be determined in another suit, and they gave to the plaintiff a decree for rent which it might afterwards appear he was not entitled to have. Its being a suit for rent did not prevent the Courts from going into the real question between the parties, and determining whether the defendant by reason of his purchase in the manner alleged had ceased to be liable as a tenant, and had become, in fact, the proprietor of the land so that the tenancy merged in his higher right. This is a mode of dealing with the case which cannot be defended. In fact, when the special appeal came on before us, it was seen that it could not; and we were asked, as there was no dispute about the facts of the case, to decide whether the plaintiff was entitled to recover his rent or not. The decision of this depends upon the dates of the transactions which were stated to us by the learned Counsel who appeared for the respondent.

The attachment upon which the sale at which the plaintiff purchased took place was on the 7th of November, 1871. In December, 1871, the defendant brought his suit upon his mortgage which was what is generally called a mortgage-bond—being a money-bond with a Clause creating a charge upon the property, and not a mortgage by a way of conditional sale, which would convey the property to the defendant. In February, 1872, there was a decree by consent in that suit, the decree being in the usual form and authorizing the realization of the money due upon the mortgage by a sale of the mortgaged property. On the 18th of April, 1872, the property was sold under the attachment of the 7th of November, 1871, through which the plaintiff claimed, but a few days before that, the property had been attached by the defendant in execution of the decree which he had obtained. The plaintiff, as has been already mentioned, was a purchaser at the sale on the 18th of April and he claimed rent from that date.

It was objected that the certificate of the sale to the defendant had not been registered and that the defendant was, therefore, unable to use it as evidence of his title. The certificate of the sale to the plaintiff had been registered. The question is whether, under these circumstances, the defendant can be considered to have acquired as against the plaintiff a title to the property, because if he has, he cannot be liable to pay to the plaintiff the rent which has become due afterwards.

It does not appear at what precise periods the rent was payable, or whether any instalment of it became due between the date of the plaintiff's purchase and the date of the defendant's purchase. If

1874.

Rajkishen Mookerjee v. Radha Madhub Holdar.

any instalment did become due between those dates, the plaintiff is entitled to it because the defendant can only claim exemption from payment of rent from the time when he became the purchaser. We have to consider then, whether, notwithstanding the non-registration of the certificate of sale, the defendant has a good title.

The suit on the mortgaged bond was, as we have stated, commenced in December, 1871, and was pending at the time the plaintiff purchased. The mortgagors were bound by the proceedings in that suit, including the attachment, the order for sale, and the order of the Court confirming the sale; and if the plaintiff is bound by them, the defendant will have a good title against him in the same manner as he would have against the mortgagors whose interest the plaintiff purchased.

The right and interest which the plaintiff purchased was the right and interest which the mortgagors had. And if the effect of the suit was to bind the plaintiff, it was of no matter that the certificate of sale was not registered.

The question whether a purchaser under an execution is bound by a *lis pendens* was considered by the late Supreme Court in *Gour Monee Dabee* v. *Read* (1). It was not necessary for the decision of that case that the Court should determine the question; but the learned Judge who delivered the judgment seems to have considered that it was one which it would be proper for him to decide, and he held that the doctrine of *lis pendens* did not apply to a purchaser at a sale by a Sheriff. If he were right, it ought not to apply to a purchaser at a sale in execution of a decree under Act VIII of 1859. But the judgment of Sir James Colvile is founded very much (we do not say altogether but very much) upon the fact that in the English Courts there had been no decision applying the doctrine of *lis pendens* to a case of that description. It does not appear to have occurred to him that at that time, from the state of the law in England, there could not have been such a decision. What remains in the mortgagor is only what is known as the equity of redemption, the right to sue in a Court of Equity to be allowed to redeem the property.

That was not an interest which could be taken by the Sheriff in execution of a judgment of a Court in England and be sold by him. It was not until the Acts I and II, Victoria, c. 110, s. 13, by which judgments were made charges upon real property, that an equity of redemption could be sold in satisfaction of a

(1) 2 Taylor and Bell, p. 83.

judgment ; and then it did not become the subject of a sale by the Sheriff, but was treated as an interest in the land—an estate in it which came within the operation of that Act.

So the absence of decisions in the Courts in England upon the question which came before the Supreme Court is fully accounted for.

The only effect of holding that the doctrine of *lis pendens* does not apply would be that the proceedings in the suit against the mortgagor would become ineffectual. If there is a sale in execution of a decree against him pending those proceedings, the person buying at the sale does not get more than the mortgagor had, that is, he gets only the right to redeem the property. And the result would be that the mortgagee (we use the term mortgagee to describe the person who is suing on the mortgage bond to establish his charge, for the reasoning applies in the one case as much as in the other) would have to bring a fresh suit against the purchaser in order to foreclose him from redeeming ; and if pending the suit, there was a decree against him in another suit, and in execution of it his right and interest were attached and sold and some person purchased it, a third suit would be necessary. This is, in fact stated by Sir James Colvile at p. 111 in his judgment, for he says ;—"If the purchaser at a Sheriff's sale should fail to set aside the decree for fraud, he would (supposing the doctrine of *lis pendens* to apply to him) be absolutely defeated ; whereas the successful suitor in equity is only delayed : he can always reassert against the purchaser at the Sheriff's sale those equities to which the judgment-debtor was subject."

According to this the mortgagee could reassert against the purchaser at a Sheriff's sale the right to foreclose or to have the property sold in order to realize the money due on the mortgage.

The ground upon which the doctrine of *lis pendens* rests is stated in a modern decision in England, and it will be found to apply to a case like the present. In *Bellamy* v. *Sabine* (1) which is a leading case on the subject, Lord Justice Turner says that the doctrine is not founded upon any peculiar tenets of a Court of Equity as to constructive notice, but prevails alike in law and equity resting on this foundation that it would be impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail.

Now to apply what is there said to be the foundation of the doctrine to a case like the present, it would be impossible for the suit by the mortgagee to have the money realized by the sale of the

(1) 1 De G. & J., 556.

1874.

Rajkishen Mookerjee v. Radha Madhub Holdar.

mortgaged property to be brought to a successful termination, if persons buying under an execution against the mortgagor are not to be bound by the proceedings. Although there may be no decision of the English Courts upon this question, the case, in our opinion, clearly comes within the reason of the rule, and with the utmost respect to the Judges of the late Supreme Court we feel compelled to say that we cannot treat their decision as an authority on this point. It appears to have been questioned by the profession at that time from the note to the report in Taylor and Bell.

In the present case the property was ordered to be sold, and was sold in execution of the decree obtained by the mortgagee. There was an order confirming the sale, which order would relate back to the time of the sale; the sale would be confirmed as from the date when it was made. And although the certificate of the sale might be necessary for the purchaser, if he was seeking to establish his title against other persons, yet without any certificate the defendant in that suit, the mortgagor, and the plaintiff in the present suit would be bound by the proceedings and there would be a good title against them. The order confirming the sale would complete the title of the defendant as against them. The Registration Act does not require that the order confirming the sale shall be registered; in fact, orders and decrees are mentioned in it as not requiring to be registered.

The result is that in this case the defendant has shown that as against the plaintiff he had a right to be no longer treated as a tenant from the time when he purchased the property. If any rent, as we have said, became due between the two periods the defence will not apply to that. We will postpone making our decree in order that the parties may agree if they can, whether any rent, and if so, what amount, became due between the date of the plaintiff's purchase and the date of the defendant's purchase.

It having been agreed between the pleader for the appellant and the pleader for the respondent that Rs. 250 became due between the dates of the respective purchases, we reverse the decrees of the lower Courts, and give a decree for the plaintiff for Rs. 250, and interest thereon at 6 per cent. from the institution of the suit, with costs in the lower Courts in proportion to the amount decreed, and the respondent will pay the costs of this appeal.

NOTE.—This case is an authority for the proposition that a purchaser of immoveable property is bound by the doctrine of *lis pendens*, if his purchase takes place during the pendency of a contentious suit relating to that property.

1874.

Rajkishen Mookerjee v. Radha Madhub Holdar.

This principle has now been affirmed by the Judicial Committee, *see Radha Madhub Holdar* v. *Monohar Mukerji*, I.L.R. 15 Calc. 756 P.C.; the judgment in that case should be carefully studied as that litigation arose out of the same transactions as led to the suit of *Raj Kishen Mookerjee* v. *Radha Madhub*, 21 W.R. 349.

This case also decides that an execution purchaser is a representative of the judgment-debtor within the meaning of Sec. 244 C.P.C. in respect of the property purchased. This point is now settled by two Full Bench decisions, *Ishan Chander* v. *Beni Madhab*, I.L.R. 24 Calc. 62; *Gulzari Lal* v. *Madho Ram*, I.L.R. 26 All. 447.

ISHAN CHUNDER DAS SIRKAR

v.

BISHU SIRDAR.*

[*Reported in I.L.R. 24 Calc., 825.*]

1897.
May, 17.

The judgment of the High Court (MACLEAN, C.J & BANERJEE, J.) was as follows :—

This appeal arises out of a suit brought by the plaintiff (appellant) for declaration of his title to, and for confirmation of his possession of, an eight-annas share of a certain *jote*, on the allegation that the said share, which belonged originally to defendants Nos. 5 and 6, was purchased by the plaintiff from these defendants for Rs. 1,000 on the 18th Pous 1297, (1st January, 1891), under a registered deed of sale ; that defendant No. 4 having, in execution of a decree held by him against defendants 5 and 6, attached the said share, the plaintiff preferred a claim, but the same was disallowed ; and that the property was sold in execution of the decree of defendant No. 4 and purchased by defendants Nos. 1 to 3 on the 21st March, 1891. Two other persons were made defendants in the case, but subsequently, at the plaintiff's instance, their names were removed from the record.

The suit was defended by defendants Nos. 1 to 4, and their defence, so far as it is necessary to be considered for the purposes of the present appeal, was a denial of the plaintiff's purchase as a real and *bona fide* transaction.

The first Court found that the purchase of the plaintiff was not a real and *bona fide* transaction, but was merely a nominal one, resorted to with the object of defeating the claim of defendant No. 4, and it accordingly dismissed the suit.

On appeal by the plaintiff, the lower Appellate Court has found that the plaintiff purchased the property, but not in good faith, and it has accordingly affirmed the decree of the first Court, dismissing the suit. In second appeal it is contended for the plaintiff that the decision of the lower Appellate Court is wrong in law, because the mere circumstance of the plaintiff having been

* *Present* :—Sir Francis William Maclean, Knight, Chief Justice and Mr. Justice Banerjee.

1897.

Ishan Chunder Das Sirkar v. Bishu Sirdar.

aware of the fact that the defendant No. 4 had taken out or was going to take out execution against defendants Nos. 5 and 6 was not sufficient to make his purchase one not in good faith as the lower Appellate Court has held. It is further contended that the only thing necessary to constitute a purchase in good faith, was that the purchase should be real and for value, and a real purchase for value, even if it was with the object of defeating or delaying creditors, would still be a purchase in good faith and entitled to be upheld; and in support of this contention the cases of *Wood* v. *Dixie* (1), *Hale* v. *Saloon Omnibus Co.* (2), *Ramburun Singh* v. *Jankee Sahoo* (3), *Sankarappa* v. *Kamayya* (4), *Suba Bibi* v. *Balgobind Das* (5), and *Sakharam Mahipat* v. *Dawud Valad Jawabhai* (6) are relied upon.

On the other hand, it has been argued for the respondents that the question of good faith is a question of fact, and the lower Appellate Court having found that the purchase of the plaintiff was not in good faith, it is not open to this Court to interfere with its judgment in second appeal; and in support of this argument the case of *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (7) is referred to.

Now, the validity of the purchase under which the plaintiff claims is to be determined with reference to section 53 of the Transfer of Property Act, which enacts that "every transfer of immoveable property" (we are only quoting so much of the section as is applicable to the present case) "made with intent to defeat or delay the creditors of the transferor is voidable at the option of any person so defeated or delayed." And then, after laying down a rule of evidence, the section further proceeds: "Nothing in this section shall impair the rights of any transferee in good faith and for consideration."

Reading this section as a whole then, what it means, so far as it is applicable to a case like the present, is this,—that where a transfer of immoveable property is made with intent to defeat or delay any creditor of the transferor it is voidable at his option; but where a transferee for value takes the property in good faith, that is without being a party to any design on the part of the transferor to defeat or delay his creditors, his rights shall not be impaired by anything contained in this section.

(1) 7 Q. B., 892.
(2) 4 Drew., 492.
(3) 22 W. R., 473.
(4) 3 Mad. H. C., 231.
(5) I. L. R., 8 All., 178.
(6) I. L. R., 4 Bom., 76 note.
(7) I. L. R., 18 Calc., 23; L. R., 17 I. A., 122.

1897.

Ishan Chunder Das Sirkar v. Bishu Sirdar.

The words "good faith" have not been defined in the Act; nor is there any definition of the expression in the General Clauses Act of 1868, which was in force when the Transfer of Property Act was passed.

But a consideration of the section, taken as a whole, leads us to the view we have taken, that the object of the last paragraph of section 53 is to protect an innocent transferee for value, notwithstanding that the transferor may be actuated by a desire to defeat or delay his creditors. But there arises a further question,—whether, where a transferee for value has knowledge of an impending execution against the transferor, such knowledge itself is sufficient to vitiate the transfer and make it one not in good faith, notwithstanding that the transferee may not be aware of any intention on the part of the transferor to defeat or delay his creditors, and notwithstanding that he may honestly believe that the sale is resorted to for the purpose of paying the creditors. We are of opinion that mere knowledge of an impending execution against a transferor is not sufficient to make the transferee a transferee otherwise than in good faith, when he does not share the intention of the transferor to defeat or delay his creditors.

This view is fully supported not only by reason but also by authority: see the case of *Ramburun Singh* v. *Jankee Sahoo* (1). We are not prepared, however, to accept as correct the extreme contention urged on behalf of the appellant, that all that was necessary to constitute a transferee in good faith within the meaning of section 53 was that the transfer should be real, and that, although the transferee might share the intention of the transferor to defeat or delay creditors, he would still be a transferee in good faith. It cannot be said that a transferee for value who accepts the transfer for the purpose of helping the transferor to convert his immoveable property into money which can easily be concealed and kept out of the reach of his creditors, and thus defeat or delay the creditors, is a transferee in good faith within the meaning of section 53. We do not think that the cases cited support this view. They are cases under 13 Elizabeth, c. 5; and though that Statute forms in part the ground-work of section 53 of the Transfer of Property Act, its language is different, and the Indian law goes much further than the English Statute. In the case of *Wood* v. *Dixie* (2) it was held that a transfer of property for good consideration was not void merely because it was made with intent to defeat the expected

(1) 22 W. R., 473. (2) 7 Q. B., 892.

execution of a judgment-creditor; and the same view was taken in the case of *Hale* v. *Saloon Omnibus Co.* (1); but they do not go so far as the appellant's contention goes. Indeed, it would almost be a contradiction in terms to say that a transferee for value, who takes the transfer with the intention of helping the transferor to convert his immoveable property into money which can easily be concealed, and thus to defeat or delay his creditors, should nevertheless be treated as a transferee in good faith, and the transfer to him should be upheld, though section 53 says that a transfer made with such intention is voidable at the option of the creditors. Where the transferee is a creditor of the transferor, and accepts the transfer in satisfaction of the debt due to him, though with the knowledge that his doing so has the effect of defeating other creditors of the transferor, the transfer may come within the last paragraph of section 53 of the Transfer of Property Act. But that is not the case before us, and it is unnecessary to say more on this point.

There arises then the question whether the Court of Appeal below has come to a finding that the purchase of the plaintiff was not in good faith, so as to preclude this Court from interfering in second appeal. No doubt, if the lower Appellate Court has found upon the evidence that the plaintiff was not only aware of the impending execution of decree against his vendors but also shared the intention of his vendors to defeat or delay that execution, the finding would be unassailable in second appeal. But if, after having found that the intention of the vendors was to defeat or delay their creditors, and that the plaintiff was only aware of an impending execution against the vendors and nothing more, the lower Appellate Court has come to the conclusion that the plaintiff's purchase was one not in good faith, then that conclusion is an inference based upon this view of law, that mere knowledge on the part of the transferee that there is an impending execution, coupled with an intention on the part of the transferor to defeat or delay his creditors—an intention not known to the transferee—necessarily makes the purchase one other than in good faith—a view of the law which, as we have shown above, is erroneous. And, if that be so, the judgment is open to question in second appeal.

In support of this view we may refer to the cases of *Lachmeswar Singh* v. *Manowar Hossein* (2) and *Ramgopal* v. *Shamskhaton* (3).

(1) 4 Drew., 492.
(2) I. L. R., 19 Calc., 253; L. R., 19 I. A., 48.
(3) I. L. R., 20 Calc., 93; L. R., 19 I. A., 228.

1897.

Ishan Chunder Das Sirkar v. Bishu Sirdar.

Now, as we understand the judgment of the learned Judge below, he has not come to any finding that the plaintiff shared the intention of defendants Nos. 5 and 6 to defeat or delay their creditors; but he has come to the conclusion that the plaintiff's purchase was not in good faith, because he found that the plaintiff was aware of the impending execution of decree against defendants Nos. 5 and 6 by defendant No. 4, and of that alone. But, as we have said above, such knowledge may be consistent with good faith in the plaintiff, and the purchase by the plaintiff will not be vitiated on the ground of bad faith, unless it can be clearly proved that the purchaser was a party to a design of his vendors to defeat or delay their creditors. We should add that we do not think that the learned Judge below was right in importing into section 53 the definition of constructive notice given in section 3 of the Act.

In this view it becomes necessary to remand the case to the lower Appellate Court, in order that it may determine the question whether the plaintiff purchased the property in dispute from defendants Nos. 5 and 6 with the object of enabling them to defeat or delay their creditor, the defendant No. 4, or with the knowledge that they intended to do so.

If it come to an affirmative finding on that question, the suit must be dismissed. If it come to a negative finding the plaintiff will be entitled to a decree.

Costs will abide the result.

Appeal allowed. Case remanded.

NOTE:—The effect of a colourable conveyance in fraud of creditors when such fraud has not been accomplished is elaborately discussed in a recent judgment of the Calcutta High Court, to which reference may usefully be made, *Lala Hakim Lal* v. *Moothahar Sahoo*, 6 C. L. J., 410; I.L.R. 34 Calc., 999. In that case it was pointed out that where a *benami* conveyance is executed in order to defraud creditors, before the fraud has been carried into effect, the executant may repudiate the entire transaction, revoke all authority of his confederate to carry out the fraudulent scheme and recover possession of the property; it is only when the fraud has been accomplished that the fraudulent grantor loses the right to claim the aid of the law to recover the property he has parted with; the Court will help neither party and the estate will lie where it falls.

This view has now been affirmed by the Privy Council, see *Pether Perumal* v. *Muniandi*, 5 C. L. J., 520; L. R. 25 I. A., 98.

CHANDI CHURN BARUA

v.

SIDHESWARI DEBI. *

[*Reported in I.L.R., 16 Calc., 71 ; L.R. 15 I.A. 149.*]

1885.

April, 26.

Their Lordships' judgment was delivered by

LORD WATSON.—This suit was brought by the appellants in the year 1880, before the Court of the Subordinate Judge at Goalpara, for possession of the four *mouzahs* of Daborgaon, Salbari, Dingaon, and Bhotegaon, which are part of the Bijni Raj Estate in Assam. The original defendant was the late Raja Kumud Narain ; and since his death the estate has been represented by his widow, the Ranee Sidheswari Debi, who is respondent in this appeal. The foundation of the appellants' claim is a deed alleged to have been executed by the Raja Mukund Narain, the ancestor of the defendant, in 1185 Perganati (1778 A. D.), in favour of certain members of the Barua family, to which the appellants belong. The document, according to the translation made by the Subordinate Judge, to which no exception has been taken by either of the parties, is in these terms :

"Let peace and health rest upon your dwelling, O Kasi Nath Barua, *Dewan*, O Ram Nath Barua, O Dharmasil Barua, O Komolkant Barua, O Ram Jibun Barua. Inasmuch as because of my having caused the daughter of Kasi Nath Barua, *Dewan*, to lose caste by taking her away, you and all your connexions having become low in your minds, have conceived the design of abandoning my service and of withdrawing from my jurisdiction and going elsewhere, and for as much as from the days of the Maharajas, my deceased ancestors, you have all along been supported in various ways (*such as*) by service in my kingdom and by (*grants of*) villages and lands ; and as I too am supporting you in the same manner, and as you have now become dispirited and (*therefore it is proper*) that I should show you even greater kindness, (*I have determined that*) a means of support, that is, a perpetual wage, should be given to you ; and in case in my time or in the time of my descendants, you or your descendants should not be supported in various ways (*by me or by my descendants*), then, as a means of maintenance, that is to say as wages, I do hereby assign to you seven villages, namely, Shamraipara, Mauriagram, Daborgaon,

Present :—Lord Watson, Lord Hobhouse, Sir B. Peacock, and Sir R. Couch.

1888.

Chandi Churn Barua v. Sidheswari Debi.

Salbari, Kaitpara, Dingaon, and Bhotegaon in the nature of a fixed (*perpetual*) remuneration. However, as you are now being supported by (*the profits derived from*) three villages and by other means, for this reason four villages have not been made over to you. Those three villages that are now in your possession by virtue of farming leases, of leases for a fixed period, and of charitable grants (*you will now hold*) and you will pay rent for them, and other dues on account of them, as you have done from heretofore. If ever in the time of my descendants you are not provided with the means of maintenance (*by them*), then let those descendants of yours who may be living at that time produce this deed, and taking possession of the three above mentioned villages, and also of the four villages (*now held*) *khas* (*by me*), enjoy possession of them rent-free from generation to generation. But you will have to pay to the estate a yearly quit rent of Rs. 100. Beyond this amount I will not call upon you to pay any cesses or exactions of any kind whatsoever. These seven villages will in no way appertain to my kingdom."

It is not now disputed that Kasi Nath and Ram Jibun, two of the four grantees named in the deed, died without issue; and that the appellants are the living representatives of the other two, *viz.*, Dharmsil and Komolkant Barua. They are still in possession of the three *mouzahs* of Shamraipara, Mauriagram and Kaitpara, which their four ancestors held in 1778, by virtue of farming leases or other tenures, and which were presently assigned to them by the deed; and these *mouzahs* now yield an annual return of 4,000 *l.* sterling. As might be expected in these circumstances, the appellants do not allege in their plaint, and they do not now contend, that they have not been already provided with ample means for their support. The case which they present is, that by the terms of the deed each successive Raja was under an obligation, either to maintain them, and that not merely by grants of land, but by employing them on his estate and paying them wages, or to give them the four villages in question; and accordingly, that the conditional grant to descendants, became at once operative in their favour when the late Rajah dismissed Chandi Churn from his service in 1876, and declined to employ either him or any other of the appellants.

The real controversy between the parties turns upon the third issue adjusted in the District Court: "Is the document filed genuine, and are the plaintiffs entitled to any relief under it?" Besides disputing its genuineness, the respondent argues that the deed, in so far as concerns the disposition of the four villages claimed, is void in law; that at any rate the contingency upon which it depends is the

failure of the Raja to provide maintenance, and that no claim can lie so long as the appellants have sufficient means of maintenance derived from her predecessors in the *Raj*.

The Subordinate Judge gave the appellants a decree in terms of their plaint. He found as matter of fact that the deed was genuine, and he held as matter of law that the conditional grant to descendants is valid and effectual, and that it became operative whenever the Raja failed to support them by giving employment as well as land. On appeal the High Court reversed his decree, and dismissed the suit with costs. The learned Judges (Garth, C. J., and Beverley, J.) held that the *onus* being upon them, the appellants had not satisfactorily established the authenticity of the deed. Without deciding the point, they expressed grave doubts whether, if genuine, it was enforceable in law; but, on the assumption that it was both genuine and enforceable they held that the descendants of the four Baruas named in it have, according to the just construction of the instrument, no right to the four *mouzahs* so long as they are sufficiently maintained from any source whatever provided by the grantor or his successors.

Their Lordships have not found it necessary to consider the evidence bearing upon the question whether the deed of 1778 is or is not a genuine document. On the assumption that it is, they agree with the construction which the learned Judges of the High Court have put upon the words: "If ever in the time of my descendants you are not provided with the means of maintenance." It attributes to these words their primary and natural meaning; and there is nothing in the context which suggests that the condition which they express must be qualified by the previous narrative of the means by which the four Baruas had actually been supported. There is an antecedent promise that these Baruas and their descendants shall in future be "supported in various ways." It may be plausibly argued that the condition was intended to compel the fulfilment of that promise; but support "in various ways" simply signifies support "in some way or other"; and if the words were imported into the condition, they would not alter its meaning.

These considerations are sufficient to dispose of this appeal; but their Lordships desire to rest their judgment upon broader grounds. They are of opinion that the conditional grant of the four *mouzahs* to persons yet unborn, who may happen to be the living descendants of the grantees named, at some future and indefinite period, upon the occurrence of an event, which may possibly never occur, is altogether void and ineffectual.

1888.

Chandi Churn Barua v. Sidheswari Debi.

The manifest purpose of the deed was to fasten upon the grantor, and his successors in the *Raj*, a perpetual duty of giving, in some way or other, the means of maintenance to all the descendants of four persons who were in life at its date. It does not directly impose an obligation of that singular and unprecedented description; but on the failure of the then Raja, at any future time, to maintain these descendants, however numerous, the latter are to have immediate right to four of his villages, which thenceforth are not to "appertain to his kingdom."

Apart from the condition upon which it is made dependent, the grant of these four villages is expressed in language which, according to Hindu Law, imports a present assignment to the grantees. It appears to their Lordships that two alternative views may be taken of its real character. It may be regarded as a present assignment to persons not yet in existence, subject to a suspensive condition, which may prevent its taking effect at all or (as in the present case) for generations to come, or it may be regarded as a contract, not a mere personal contract but a covenant running with the *Raj* estate, and binding its possessor to give the villages to those persons in the event specified. It was hardly contended that a present grant to persons unborn, and who may never come into existence, is effectual; and a covenant of that nature in favour of non-existing covenantees is open to the same objections. It is immaterial in what way an interest such as the appellants' claim is created. If it prevents the owner from alienating his estate, discharged of such future interest, before the emergence of the condition, and that event may possibly never occur, it imposes a restraint upon alienation which is contrary to the principles of Hindu law.

Their Lordships are accordingly of opinion that the judgment of the High Court must be affirmed and the appeal dismissed; and they will humbly advise Her Majesty to that effect.

The appellants must pay the costs of this appeal.

Appeal dismissed with costs.

NOTE:—This case like the Tagore case affirms the rule that no Hindu can, whether by act *inter vivos* or by will, make a gift in favour of a person not in existence at the time when the gift is made or at the death of the testator as the case may be. The present case further shows that the above rule of Hindu Law which in

terms applies only to donees may be equally applicable to transferees for consideration. See the judgment of Ayyangar, J. in *Ramasami* v. *Chinnan*, I.L.R. 24 Mad., 449 at 469. See also Sec. 14 of the Transfer of Property Act which in this respect lays down a less restrictive rule than Hindu Law. See the leading case discussed in Mukhopadhyay on Perpetuities, Tagore Law Lectures, 1898, pp. 128—133.

1888.

Chandi Churn Barua v. Sidheswari Debi.

RAJA KISHENDATT RAM

v.

RAJA MUMTAZ ALI KHAN.*

[*Reported in I. L. R., 5 Calc., 198 ; L. R. 6 I. A. 145.*]

1879. *March*, 28.

The following judgdment of their Lordships was delivered by Sir J. Colvile.—The facts of this case, though some of them were originally contested, are now hardly in dispute, and may be shortly stated.

On the 22nd of May, 1846, Raja Omrao Ali Khan, described as the zemindar of Ilaka Utraola (the father of the respondent), executed in favor of Pande Ramdatt Ram (who is now represented by his brother, the appellant) an instrument of mortgage. The nature of the interest so mortgaged, or intended to be mortgaged, will be afterwards considered. At present it is sufficient to state that the deed purported to be an usufructuary mortgage of the villages specified in the schedule to it, redeemable on the repayment, at a certain season of the year, of Rs. 36,000, the principal sum secured ; the mortgagee entering into possession, and taking, until redemption, the rents and profits of the mortgaged property, in lieu of interest. Of those villages, two, *viz*, Panipur and Mubarakpur, have in some way ceased to belong to the estate ; the others have been conveniently divided into seven separate classes or groups.

Immediately after the execution of the deed, the mortgagee attempted to enter into the actual receipt of the collection from the lands comprised in the mortgage, but was encountered by the opposition of a number of persons, who claimed to hold all or most of those villages under various '*birt*' tenures, the effect of which was to make each of them the zemindar of the villages comprised in his tenure, rendering only some small dues and payments to the Raja of Utraola. The resistance of the *birtias* seems to have been in a great measure successful ; and it must now be taken to have been found in the suit that the *birts* were valid and subsisting sub-tenures at the date of the mortgage ; and that the rights of the *birtias* in the different villages comprised in the 1st, 3rd, 4th and 6th of the seven classes or groups above referred to, were purchased by the

* *Present* :—Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

mortgagee some time in or before the year 1849. The *birt* right (if any) in the villages comprised in the remaining three groups remained in the original *birtias* or their representatives. Thus stood the rights of the parties at the time of the annexation of Oudh.

At the summary settlement, posterior to Lord Canning's proclamation, the mortgagee appears to have been allowed to engage for all the villages contained in the seven groups, and thence forward to have held them as a taluk, subject of course to the right of any subordinate zemindar or other sub-tenant, to a sub-settlement.

In December, 1870, and in the course of the regular settlement of the province, the respondent, as the son and representative of the original mortgagor, asserted by the present proceedings his right to redeem. That right, though at first disputed, is now admitted, and the only questions that remain open between the parties are, what are the nature and extent of the redeemable interest, and on what terms is the right of redemption to be exercised. These questions have received three different solutions in the course of the voluminous proceedings that have been had in the cause.

Captain Forbes, the Settlement Officer, in his proceeding of the 5th November, 1873, found that, at the time the mortgage-deed was executed, the mortgagor's right and interest in the property mortgaged was limited to the annual levy of a village tax, called '*bhent*', and of certain market-dues, to the occasional levy of a cess known as '*sharakatana*,' and to a reversionary right in all lapsed '*birt*' estates, the title in which had been derived from the mortgagor's family; that the taxes thus levied were of the nature of feudal or manorial tribute, and though necessarily fluctuating in amount, may be held to be represented by a sum equivalent, as nearly as possible, on an average to 10 per cent. of the rental taken as the standard for assessment of the Government demand, and that the right and interest thus defined was all that the Raja of Utraola was competent to convey, and all that was conveyed under the mortgage-deed.

This proceeding being under a remand, Captain Forbes was not competent to determine the case judicially; but, from the above finding, it may be inferred that, in his opinion, all that the mortgagor was entitled to redeem, was the superior title as above described, subject to the *birt* interests whether vested in the mortgagee or others.

The Commissioner, by his final judgment of the 20th of June, 1874, decided that what was conveyed by the mortgage and was

1879

Raja Kishendatt Ram v. Raja Mumtaz Ali Khan.

then redeemable by the mortgagor was, as between him and the mortgagee, the full and unrestricted proprietary title in the estates covered by the deed of mortgage. He treated the acquisition of the *birts* by the mortgagee as made on behalf of the mortgagor, and apparently proposed to allow the former nothing for what he had expended on such acquisitions.

This judgment was on appeal varied by the Judicial Commissioner, whose order of the 9th of February, 1875, was in the following terms:—

"The right of redeeming the mortgage on the estate of Itwa Khera, executed in 1253 Fusli (1846) by Omrao Ali Khan, ancestor of plaintiff, in favor of defendant, is decreed in favour of plaintiff on payment of Rs. 36,000, and if the plaintiff at the time of redemption pays to defendant the further sum of Rs. 3,139, he will be entitled to re-enter on the estate with all the rights and privileges now enjoyed by the defendant; but if he fail to pay the further sum of Rs. 3,139 at the time of redeeming the mortgage, defendant will be entitled to retain the rights and interests of the *birtia* zemindars purchased by him in the estates of Khera Dhi, Bankata Ganeshpur, Sanapar, and Itwa, and will retain these rights as an absolute under-proprietary tenure in subordination to plaintiff, paying to the plaintiff a rent equivalent to the Government demand for the time being, with an addition of 10 per cent."

Against this order the present appeal is preferred. There is no cross-appeal; and, therefore, the contention between the parties is narrowed to this, can the mortgagor, upon paying the purchase-money of the *birts*, plus the original mortgage-money, redeem the estate as it is now enjoyed by the mortgagee; or is the latter entitled in any case to retain the rights and interests of the *birtia* zemindars purchased by him as an absolute under-proprietary tenure in subordination to the talukdar, and to have a sub-settlement on that basis.

The issue thus evolved from this lengthy litigation is a narrow, but a nice and somewhat difficult, one.

The appellant originally insisted that what was mortgaged was the mere right to receive a malikana allowance; and he still insists that the mortgage must be taken to have been made subject to the *birts*; that those *birts*, though held in some sense under the Raja of Utraola, were distinct estates; that the plaintiff is not entitled to redeem more than his ancestor mortgaged; and that the appellant or his brother was, notwithstanding the relation of mortgagor and mortgagee, entitled to purchase, and must be deemed to have

purchased, the *birts* bought by him in his own right, and for his own benefit.

Their Lordships are not prepared to affirm the broad proposition that every purchase by a mortgagee of a sub-tenure existing at the date of the mortgage must be taken to have been made for the benefit of the mortgagor, so as to enhance the value of the mortgaged property, and make the whole, including the sub-tenure, subject to the right of redemption upon equitable terms.

It may well be that when the estate mortgaged is a zemindari in Lower Bengal, out of which a patni-tenure has been granted, or one within the ambit of which there is an ancient mokurari istimrari tenure, a mortgagee of the zemindari, though in possession, might purchase with his own funds and keep alive for his own benefit that patni or mokurari. In such cases the mortgagee can hardly be said to have derived from his mortgagor any peculiar means or facilities for making the purchase, which would not be possessed by a stranger, and may therefore be held entitled, equally with a stranger, to make it for his own benefit. In such cases also the patni, if the patnidar failed to fulfil his obligations, would not be resumable by the zemindar, and the zemindari would always have been held subject to the mokurari.

Their Lordships nevertheless have come to the conclusion, though not without some doubt and difficulty, that the decision of the Judicial Commissioner was, in the peculiar circumstances of this case, correct, and ought to be affirmed.

The first point to be considered is, what is the true construction of the original contract, and what were the intentions and understanding of the parties to it. The deed was not in terms made subject to recognized *birts*, for it contains no reference to them. On the face of it, it is a mortgage of the ilaka or ilakas, consisting of the thirty-five villages, one piece of land, and one jote, "including all the internal and external rights which had descended to the mortgagor from his ancestors." And it is expressed to be upon the following conditions, *viz.* :—"That the said Pande is allowed to take possession of the said villages, and enter into engagement with the Government for the payment of revenue. I (the mortgagor) shall have nothing to do with the profits of the estate, or to stop the injuries which may be done to it. I shall be entitled to redeem the estate when I pay the said sum (the Rs. 36,000) in one lump to the Pande in the month of Baisakh (April), when there are no crops standing on the ground. If any one appears to lay claim to the said estate, it will be my duty to defend

1879.

Raja Kishen datt Ram v. Raja Mumtaz Ali Khan.

the suit, with which the Pande shall have nothing to do." The last stipulation obviously points to a possible claim by title paramount to the whole zemindari, and is in the nature of a covenant for title. The other stipulations plainly indicate that the mortgagee, until redemption, was to be the zemindar *de facto* of the estate, with all the rights, privileges, and powers of a zemindar, as between him and the subtenants; that he was to take the profits of it, and defend it against the injuries done to it; and, further, that it was in the contemplation of both parties that he might take possession of the villages, and receive the collections from them. This construction is consistent with the decisions of all the Courts that have dealt with the case. All have negatived the original contention of the defendant, that the plaintiff had no other right than that of redeeming a malikana allowance, and have held that the subject of the mortgage was the talukdari interest, with all its incidents, whatever that might include.

The next point to be considered is, what was the nature of the *birt* tenure, and what the relations between the *birtias* and the superior zemindar. Upon this point their Lordships were referred by Mr. Doyne to the Settlement Circular of the 29th of January, 1861, being an official paper issued by the then Chief Commissioner of Oudh by way of instructions relative to the regular settlement of the province then about to be made. The material paragraphs of the paper are the 18th to the 25th, both inclusive. The 18th says:—"That *birts* were given for whole mouzas, or patches of lands in mouzas, and proposes in the first instance to deal with the latter." The 19th says:—"These tenures, when granted by the talukdar for money received, will be maintained as representing the proprietary rights of the *birtias*, who by purchase have acquired the position of intermediate holders, and as constituting the portion of profits left them by the talukdar." And then, after distinguishing between *birts*, given by talukdars, and those given by mere thikadars, and treating the latter as not entitled to be maintained, it says, "*Birts* given by the original zemindars before the village was incorporated in the taluk will be upheld, unless the talukdar resumed them prior to 1262-63 Fusli (1855-56)." The 21st paragraph says:—"*Birts* of entire mouzas are very common in Gondah and Gorakpore. They originated in purchases from needy talukdars, and sometimes in clearing leases of jungle land. In the Utraola and Batui Parganas of the Gondah Districts, the *birtias* had been in many instances admitted to direct engagements with the Native Government for years previous to

the annexation, and, of course, were settled with, and should have been so at the late summary settlement, on the principle that we are not bound to restore to the talukdars what they had lost before our rule commenced." The 22nd paragraph says :—"In other instances the *birtias* held under the talukdar on the terms of their *birt* pattas. These generally were, that 10 per cent., or dyhak, as it was called, on the amount of the pattas, should be returned to them ; that, while they held on their pattas, the entire control of the village rested with them ; and if they threw them up rather than accept enhanced terms, they were entitled to 10 per cent. on the collections. Sometimes the *birtias'* proprietary profits were shown in holding a portion of the area 'nankar'." The 23rd paragraph says :—"In other instances, the *birtias* had been stripped of every vestige of proprietary right, for embarrassed talukdars would sell the *birt* of a village several times over, and nothing was more common than to see several claimants to the *birt* of a village, each with his patta in correct form." Paragraph 24 says :—" Where the *birtia* has lost possession, there is no more to be said. We are not to restore it to him, but the Chief Commissioner is clearly of opinion that the *birtias*, who were found in direct engagement with the state at annexation, or who have uninterruptedly held whole villages on the terms of their pattas under the talukdars, must be maintained in the full enjoyment of their rights in subordination to the talukdars. It is no argument that the talukdar may not realize more than 10 per cent. above the Government demand. Such *birt* tenures must be considered an intermediate interest between the talukdar and the ryot, and as such, entitled to be maintained." The 25th paragraph says :—"The meaning of the term, '*birt*' is a 'cession.' It is the purchase of the proprietary rights subordinate to the talukdars on certain conditions as to payment of rent, which were held to be binding, though undoubtedly often violated by superior power. In Gorakpore the *birtias* were generally admitted to direct engagements, though charged with a malikana of 20 per cent. to the talukdar. Here he must deal with the superior party."

The result of what has been cited seems to be that, under the nawabi, these *birt* tenures were presumably carved out of the talukdar's or superior zemindar's estate ; that they were held under him upon terms varying according to the terms of the particular patta or contract, and possibly according to the custom of a particular district ; that they did not necessarily entitle the holders of them to engage directly with the Government for the

1879.

Raja Kishendatt Ram v. Raja Mumtaz Ali Khan.

revenue; that when such direct engagements took place malikana was payable to the talukdar; that they were sometimes resumable, and when resumed would fall into the parent estate; and that in all cases the relation of superior lord and tenant subsisted between the zemindar and the *birtias*, a relation which, in an unsettled state of society like that of Oudh under the nawabi, would probably involve more or less of power in the former over the latter, and, in dealings between them, give to the zemindar advantages which would not be possessed by a stranger. On the other hand, it is clear that *birts* still subsisting are tenures which would entitle their holders to subsettlement under "the Oudh Sub-Settlement Act of 1866."

The question, however, remains, what was the effect as between the mortgagor and the mortgagee of the purchases by the latter of the *birts* in question. To determine this it is desirable to consider, somewhat more in detail, what has been his course of action.

Upon the evidence in the cause it would seem that, in and after the year 1254 (1847) Fusli (probably the first settlement after the execution of the mortgage), the mortgagee was permitted to engage for the whole estate, although some at least of the *birtias* had, in former years, been allowed to engage, for the particular villages comprised in their tenures, directly with the Government, and that he continued so to do up to the time of annexation. The first summary settlement after that event seems, however, in accordance with the policy that then prevailed, to have been made with some at least of the *birtias*, including even those of Itwa, who were now said to have previously parted with all their *birt* interests.

It has also been proved that, immediately after the execution of the mortgage, the mortgagee attempted to enter into the direct receipt of the collections of all the villages by force of his talukdari title, and was only prevented from doing so by the resistance of the *birtias*, and the interposition, with or without jurisdiction, of the officer called the Nazim. Here, then, the talukdar, *de facto*, was in open conflict with tenants of the estate claiming to be *birtias*, there is no proof of any regular trial and determination, by a Civil Court, of the disputed right. The Nazim may have taken action merely as a matter of police, and to prevent disturbance. Then follow the purchases in 1256 and 1257 Fusli (1849 and 1850), and the execution of the deeds by virtue of which the *birtias*, for very inconsiderable sums, conveyed their interests in the *birts* in question nominally to Pande Ramdatt Ram. There is, however, no evidence of the negotiations which led to these contracts;

nothing which shows upon what basis they proceeded; how far, in making the purchases, the Pande was acting in the character, and using the powers, of talukdar, or how far, in doing so, he was compromising alleged rights which might otherwise have been successfully asserted for the benefit of the estate. The apparent inadequacy of the consideration money affords a strong argument for supposing that the transactions may have been in the nature of compromises, which the powers of talukdar were exerted to effect on favourable terms.

Again, what followed on the purchases? Had they been made by or on behalf of a talukdar holding under an absolute, as distinguished from a mortgage, title, the tenures would, as a matter of course, have merged in the taluk. The mortgagee seems, until the institution of these proceedings, to have treated them as so merged. He is not shown to have taken any steps to keep them alive, as distinct sub-tenures, for his own benefit. On the contrary, at the time of the first summary settlement after annexation he never sought to engage for these villages as *birtia*, and on the summary settlement, after Lord Canning's proclamation, he did in fact engage for them as talukdar, and as parcel of the taluk. His conduct is not surprising. He probably did not contemplate redemption (in this very suit he disputed the right to redeem), and he, therefore, not unnaturally dealt with the *birts* as merged in the taluk, thereby enhancing the value of the mortgaged estate, of which he expected to become absolute proprietor.

Again, had the mortgagor redeemed before these purchases, he would have resumed his position as talukdar, with the means of dealing on favorable terms with *birtias* who have proved to have been willing to part with their interests for very inconsiderable sums. The mortgagee, taking advantage of his position of talukdar *de facto*, has so acquired the *birts* and allowed them to merge in the taluk. To allow him now to revive these *birts* for his own benefit, with the certainty of tenure and increased value which the regular settlement will give them, would obviously alter the position of the mortgagor for the worse, by reducing the redeemable estate *pro tanto* to a mere right to malikana, and possibly rendering the taluk no longer worth redemption.

Their Lordships are, therefore, of opinion that the Judicial Commissioner had strong grounds for applying the principle, which, as he explains by his subsequent Minutes of the 26th of January and the 9th of February, 1875, he intended to affirm in his order of remand of the 26th of March, 1873. In his final judgment he

1879.

Raja Kishendatt Ram v. Raja Mumtaz Ali Khan.

says:—"That his intention in sending the case back to the Commissioner's Court was to ascertain whether the defendant could prove that he had increased the value of the estate by buying up certain incumbrances, and, if so, whether he had any claim on the plaintiff in respect of his expenditure on this account."

There was some discussion at the bar on the English decision, upon similar questions between mortgagor and mortgagee. If the principle invoked depended upon any technical rule of English law, it would of course be inapplicable to a case determinable, like this, on the broad principles of equity and good conscience. It is only applicable because it is agreeable to general equity and good conscience. And, again, if it possesses that character, the limits of its applicability are not to be taken as rigidly defined by the course of English decisions, although those decisions are undoubtedly valuable, in so far as they recognize the general equity of the principle, and show how it has been applied by the Courts of this country. It is, therefore, desirable shortly to notice the arguments on this point. It seems to their Lordships that, although some of the earlier cases may have been qualified by more recent decisions, the general principle is still recognized by English law to this extent, *viz.*, that most acquisitions by a mortgagor enure for the benefit of the mortgagee, increasing thereby the value of his security; and that, on the other hand, many acquisitions by the mortgagee are in like manner treated as accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption. The law laid down in *Rakestraw* v. *Brewer* (1) as to the renewal of a term obtained by the mortgagee of the expired term, being, "as coming from the same root," subject to the same equity, has never been impeached. The English case, which in its circumstances comes nearest to the present, is that of *Doe* v. *Pott* (2), in which the principle was enforced against a mortgagor. It was there held, that if the lord of a manor mortgage it in fee, and afterwards, pending the security, purchase and take surrenders to himself in fee of copy-holds held of the manor, they shall enure to the mortgagee's benefit, and the lord cannot lessen the security by alienating them. It is difficult to see why, as in the case of a renewable lease, the same equity should not attach to the mortgagee, particularly if by reason of his position as mortgagee in possession he has had peculiar facilities for obtaining the surrenders. Some stress was laid upon the case of *Shaw* v.

(1) 2 P. W., 511.

(2) 2 Doug., 710.

Bunny (1), in which Lord Romilly, Master of the Rolls, held, that a second mortgagee was entitled, equally with a stranger, to purchase for his own benefit the mortgaged estate when sold under a power of sale contained in the first mortgage. An opinion to the same effect had previously been expressed by Vice-Chancellor Kindersley, in *Parkinson* v. *Hanbury* (2), though he decided that case against the second mortgagee on the ground of his having had actual notice of an irregularity in the sale. These authorities, however, do not seem to their Lordships to touch the present case. The effect of a sale under a power of sale is to destroy the equity of redemption in the land, and to constitute the mortgagee exercising the power of a trustee of the surplus proceeds, after satisfying his own charge, first for the subsequent incumbrancers, and ultimately for the mortgagor. The estate, if purchased by a stranger, passes into his hands free from all the incumbrances. There seems to be no reason why the second mortgagee, who might certainly have bought the equity of redemption from the mortgagor, should not, equally with a stranger, purchase the estate when sold under a power of sale created by the mortgagor. Upon the whole, then, their Lordships are of opinion that the decision of the Judicial Commissioner is equitable and correct, and they will humbly advise Her Majesty to affirm it, and to dismiss this appeal with costs.

Appeal dismissed.

(1) 33 Beav., 494. (2) 1 Drewry & Sm., 143.

NOTE :—This case lays down the doctrine that during the subsistence of a mortgage, most acquisitions by the mortgagor enure for the benefit of the mortgagee and conversely that most acquisitions by the mortgagee are to be treated as accretions to the mortgaged property or as substitutions for it. See Secs. 63 and 70, and 64 and 71 of the Transfer of Property Act.

Reference may also be made to *Leigh* v. *Burnett*, 29 Ch. D. 231, where a question of some nicety is considered, namely, is an encumbrancer on the original estate entitled to priority over a person who advances money in good faith for the purchase of the new interest on an agreement that it should be secured for his benefit. See also Sec. 90 of the Trusts Act in which it is stated that it is only when the mortgagee by availing himself of his position as such has gained an advantage in derogation of the rights of the mortgagor, that he must hold for the benefit of the mortgagor, the advantage so gained. Reference may also be made to *Krishna Gopal* v. *Miller*, I. L. R. 29 Calc. 803.

GOKALDAS GOPALDAS

v.

PURANMAL PREMSUKHDAS.*

[*Reported in 10 Calc., 1035.*]

1884.
March, 22.

Their Lordships' judgment was delivered by

Sir Richard Couch.—This is an appeal from an order of the Court of the Resident at Haiderabad, in the Deccan, dismissing an appeal from a decree of the Judicial Commissioner of the Haiderabad Assigned Districts, by which a decree of the Deputy Commissioner of the Amraoti District was affirmed. This decree was dated the 8th of August, 1879, and it was decreed by it that the respondent, Rambaksh Seochand, who was the plaintiff in the suit, was entitled, as mortgagee, to possession of nine houses hereinafter described, and it was directed, that he be put in possession thereof. The facts out of which the suit arose are as follows:—On the 22nd of June, 1873, a firm carrying on business as bankers at Amraoti under the name of Puranmal Premsukhdas, by which name it has been sued, executed, by their manager, Bhairaodin, a mortgage to Rambaksh Seochand of immoveable and moveable property at Amraoti for Rs. 26,500 and interest. On the 18th of December the firm, having become further indebted to Rambaksh Seochand in Rs. 40,000, executed in like manner to him a mortgage of other immoveable property in Amraoti, to secure the repayment of that sum, with interest. Of the nine houses which were the subject of the suit, and are described in the decree of the 8th of August 1879, one was included in the former mortgage, and the other eight in the latter. The mortgagee was put in possession of six of the houses. As to the remaining three, the latter mortgage contained the following provision:—

"On account of the following three houses, which we have already mortgaged to the New Bombay Bank for Rs. 30,000, reserving the mortgaged lien of the Bank on these houses, we mortgage them to you in payment of the sum of Rs. 16,000, subject to the condition that the New Bombay Bank has a prior right for the recovery of money due

* *Present*:—Sir B. Peacock, Sir R. P. Collier, Sir R. Couch, and Sir A. Hobhouse.

to it from these houses, and, after full recovery by it, you will be entitled to the balance, if any left. If the balance falls short, we ourselves will be responsible for the payment. At present, these houses being in the possession of the New Bombay Bank, we cannot put you in possession of them, and as soon as they will be redeemed, that is, as soon as the Bank's possession of them ceases, you should understand that they are put in your possession."

The appellant, Gokaldas Gopaldas, having obtained a decree for about Rs. 19,000 against Puranmal Premsukhdas, caused the nine houses to be attached and sold in execution of it, and in September, 1876, himself purchased the right, title, and interest of Puranmal Premsukhdas in them. On the 21st of April, 1877, he paid the Bank Rs. 5,000 on account of the mortgage debt, and on the 10th of May, 1877, Rs. 137-2-10 as payment in full of its claim upon the mortgage. The debt to the Bank had previously been reduced. He appears to have taken possession of the nine houses, and on the 11th of July, 1877, Rambaksh Seochand brought a suit against him, and Puranmal Premsukhdas, who was made the first defendant, to recover possession of them, alleging that he was entitled to it under the two mortgages to him. And if the houses were not restored to him, he claimed the mortgage money and interest.

The defence of Gokaldas Gopaldas was that the mortgages to the plaintiff were fraudulent and without consideration, and made to defeat creditors, and that the agent had no authority to execute them. And, further, as to the houses mortgaged to the New Bombay Bank, that he had paid the money due to the Bank, and had obtained the right of mortgage thereon, and the plaintiff could not claim them until they had been redeemed by Puranmal Premsukhdas. Issues were framed, the fourth being :—

"What was the effect of the payment made to the Bank of Bombay in satisfaction of Puranmal's debt on the rights of the plaintiff as mortgagee? Did possession vest in him thereupon?"

There was a dismissal of the suit by the Deputy Commissioner, and a remand by the Judicial Commissioner, of which it is not necessary to take any further notice. On the remand, the Deputy Commissioner found that the mortgages to the plaintiff were *bonâ fide*, that there was good consideration, that "possession passed to the plaintiff in accordance with the terms of those deeds," and the plaintiff was in possession when the defendant attached the houses. Upon the fourth issue he held that when Gokaldas had paid the debt to the Bank, he stood to the plaintiff in the exact position in which the mortgagor, first defendant, would have stood had he redeemed the

1884.

Gokaldas Gopaldas v. Puranmal Premsukhdas.

Bank's mortgage, and that the effect of the payment to the Bank was to entitle the plaintiff to immediate possession of the houses mortgaged to it. He gave the plaintiff a decree for possession of the nine houses, and directed him to be put into possession.

This judgment was affirmed on appeal by the Judicial Commissioner, and a special appeal therefrom to the Court of the Resident at Haiderabad was dismissed.

Two grounds have been taken in the appeal to Her Majesty in Council from the decree of the Resident: (1) that the mortgages to Rambaksh Seochand were not *bond fide* or made for good consideration; (2) that as regards the three houses in mortgage to the Bombay Bank, the appellant was entitled to stand in the place of the Bank, and to retain possession of them until the amount paid by him to the Bank was repaid.

As to the first ground, there are concurrent judgments of the lower Courts against the appellant, and the propriety of them was not disputed at the bar. Consequently the appeal fails as to this ground, and altogether so far as it relates to six of the houses.

Upon the second ground the question is whether the doctrine in *Toulmin* v. *Steere* (1) should be applied in the case. In the judgment of Sir William Grant, M.R., in that case there is a passage to the following effect:—

"The cases of *Greswold* v. *Marsham* (2), and *Mocatta* v. *Murgatroyd* (3) are express authorities to show that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in, against subsequent incumbrances of which he had notice."

The authority of *Toulmin* v. *Steere* (1) has been much questioned, and it has been found upon examining the Registrar's book that *Greswold* v. *Marsham* (2) is no authority whatever for the proposition in support of which it has been usually cited (2 Dart's Vendors and Purchasers, 5th edition, 917). Vice-Chancellor Hall, in *Adams* v. *Angell* (4), shows in how unsatisfactory a state the law is upon this point. He says (p. 641):—

"Doubtless those cases have been questioned. In *Gregg* v. *Arrott* (5) Sir E. Sugden said that he and Sir Samuel Romilly thought 'at the time' it was wrong; and, in *Watts* v. *Symes* (6), Lord Justice Knight Bruce expressed doubts as to the decision. In the recent case of

(1) 3 Mer., 210.
(2) 2 Ch. Cas., 170.
(3) P. Wms., 393.
(4) L. R. 5 Ch. D., 634.
(5) 1 Lloyd & Gould, 246.
(6) 1 DeG. M. & G., 240.

1884.

Gokaldas Gopaldas v. Puranmal Premsukhdas.

Stevens v. *Mid-Hants Railway Company* (1), Lord Justice James said as to *Mocatta* v. *Murgatroyd* (2), *Toulmin* v. *Steere* (3) and *Parry* v. *Wright* (4): 'Those cases, perhaps, some day will have to be reconsidered, but it is quite clear that their principle is not to be extended. Probably they are rendered innocuous by this, that conveyancers exclude their application by putting in three or four lines saying that the original debt is to be considered as subsisting for the benefit of the person who has paid it off.' But the decision in *Toulmin v. Steere* (3) was recognized by Sir George Turner in *Squire* v. *Ford* (5), by Sir J. Leach and Lord Lyndhurst in *Parry* v. *Wright* (4), in effect by Lord St. Leonards in *Armstrong* v. *Garnett* (6), and by Lord Cranworth in *Otter* v. *Lord Vaux* (7). In *Anderson* v. *Pignet* (8) it was referred to by Lord Selborne as having been questioned by some persons, but his Lordship did not say that he approved or disapproved of it. It is said in some of the cases that the priority may be preserved."

When *Adams* v. *Angell* came before the Court of Appeal, Sir George Jessel, M. R., said as to *Toulmin* v. *Steere* (3): "Assuming it, however, to be binding upon us, it amounts to no more than this, that, in the case of a purchase from the owner of an equity of redemption, the purchaser with notice, whether actual or constructive, of other incumbrances, is not, in the absence of any contemporaneous expression of intention, entitled as against the other incumbrancers of whose securities he has notice, to say afterwards that the incumbrances so paid off are not extinguished. It does not go beyond that, and there are several authorities which say that this doctrine is not to be carried further." This principle was acted upon in *Watts* v. *Symes* (9), where, as in *Toulmin* v. *Steere* (3), a first mortgagee was paid off by the purchaser of the ultimate equity of redemption at the time of his purchase, and out of the purchase-money, but a declaration by the vendor that the first mortgage should be kept alive was considered sufficient to prevent a second mortgagee from treating it as extinguished.

In the case before their Lordships, the debt to the Bank was not paid off out of the purchase money. The appellant purchased the interest of the mortgagor only, and did not in any way bind himself to pay off that debt. When he paid the Bank, some six months afterwards, it was not because he was under an obligation to do so. This case might therefore be distingushed from *Toulmin v. Steere* (3),

(1) L. R. 8 Ch. Ap., 1064. (2) P. Wms., 393.
(3) 3 Mer., 210. (4) 5 Rus., 142, 148.
(5) 9 Hare, Ca. in Chanc.' 47. (6) 4 Dru. & War., 182.
(7) 2 Kay and J., 650; 6 De G. M. & G., 642.
(8) 2 L. R. 8 Ch. App. Cas., 180. (9) 1 De G. M. & G., 240.

1884.

Gokaldas Gopaldas v. Puranmal Premsukhdas.

but their Lordships do not think it necessary to do this, as they are not prepared to extend its doctrine to India.

There are some decisions in India which their Lordships think they ought to notice. In *Gaur Narayan Mazumdar* v. *Brajanath Kundu Chowdhury* (1), *A* mortgaged certain lands to *B*, and afterwards mortgaged the same to *C*, who having obtained a decree for the redemption of the mortgage to *B*, paid off the debt to him; but it did not appear that he took an assignment of the mortgage. It was held by the High Court at Calcutta, on the authority of *Toulmin* v. *Steere*, that the first mortgage was extinguished, and a lease made by *A* between the two mortgages was binding upon *C*. In *Itcharam Dayaram* v. *Rayji Jaga* (2), the High Court at Bombay held that, generally speaking, the purchaser of an equity of redemption, with notice of subsequent incumbrances, stands in the same situation as regards such subsequent incumbrances, as if he had been himself the mortgagor; he can neither set up against such subsequent incumbrances, a prior mortgage or his own, nor consequently a mortgage which he or the mortgagor may have got in. For this, *Toulmin* v. *Steere*, *Greswold* v. *Marsham*, and *Mocatta* v. *Murgatroyd* are quoted. On the other hand, the High Court at Madras in *Ramu Naikan* v. *Suberaya Mudali* (3), held that a prior mortgagee, having purchased the ultimate interest, may still use his mortgage as a shield against the claims of subsequent mortgagees, saying that in later cases the Judges had sought to mitigate the rigidity of the doctrine of Sir W. Grant in *Toulmin* v. *Steere* (4). The doubts as to that case, or the propriety of introducing the doctrine of it into India as a rule of justice, equity and good conscience, do not seem to have been considered by the High Court at Calcutta or Bombay.

The doctrine of *Toulmin* v. *Steere* (4) is not applicable to Indian transactions, except as the law of justice, equity, and good conscience. And if it rested on any broad intelligible principle of justice, it might properly be so applied. But it rests on no such principle. If it did, it could not be excluded or defeated by declarations of intention or formal devices of conveyancers whereas it is so defeated everyday. When an estate is burdened by a succession of mortgage, and the owner of an ulterior interest pays off an earlier mortgage, it is a matter of course to have it assigned to a trustee for his benefit as against intermediate mortgagees to whom he is not personally liable.

(1) 5 B. L. R., 463.
(2) 11 Bom. H. C. R., 41.
(3) 7 Mad. H. C. R., 229.
(4) 3 Mer., 210.

1884.

Gokaldas Gopaldas v. Puranmal Premsukhdas.

In India the art of conveyancing has been and is of a very simple character. Their Lordships cannot find that a formal transfer of a mortgage is ever made, or an intention to keep it alive ever formally expressed. To apply to such a practice the doctrine of *Toulmin v. Steere*, seems to them likely, not to promote justice and equity, but to lead to confusion, to multiplication of documents, to useless technicalities, to expense, and to litigation.

The obvious question to ask in the interest of justice, equity, and good conscience, is, what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest. In the familiar instance of a tenant for life paying off a charge upon the inheritance, he is assumed in the absence of evidence to the contrary, to have intended to keep the charge alive. It cannot signify whether the division of interests in the property is by way of life estate and remainder, or by way of successive charges. In each case it may be for the advantage of the owner of a partial interest to keep on foot a charge upon the corpus which he has paid.

Their Lordships are of opinion that the lower Courts in this case were wrong in holding that the appellant was in the same position as the mortgagor. They hold that the mortgage to the Bank was not extinguished, and that the appellant, the second defendant, had a good defence to the suit for possession of the three houses included in that mortgage. They will therefore humbly advise Her Majesty that the decree appealed from should be modified by omitting from it the houses which are described in it under the numbers 4, 5, and 6, and by dismissing the suit so far as it regards those houses with costs in the lower Courts in proportion. And as the appellant has failed on the question of the validity of the mortgages to Rambaksh Seochand, they make no order as to the cost of this appeal.

MOHESH LAL

v.

MOHANT BAWAN DAS.*

[*Reported in I.L.R., 9 Calc., 961; L.R. 10 I.A., 62.*]

1883.
March, 15.

The following judgment of their Lordships was delivered by

Sir B. Peacock.—This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, upon appeal in suit brought by the appellant against the respondent and Mangal Das, in the Court of the Subordinate Judge of Bhagalpore.

In that suit the appellant sought to recover with interest the sum of Rs. 33,989-12-6, of which Rs. 18,421-7-6 were alleged to be due upon a mortgage bond, dated the 12th of May, 1872, and the balance upon a running account from that date to the 13th of August, 1875.

The plaintiff, appellant, is a banker, who for many years carried on business at Bhagalpore, not personally, but by means of *gomasthas*. The respondent, Bawan Das, the defendant No. 1, was the *mohant* of the *asthal*, at Jankinagar, in Zilla Purneah. He is described in the plaint as *chela*, or disciple of *mohant* Gorib Das, deceased, and heir of *mohant* Balgobind Das, deceased. The plaintiff claimed to recover the whole amount from the two defendants, and an order for auction sale of the property mortgaged and hypothecated under the bond for the satisfaction of the bond money. The property, hypothecated by the bond, consisted of one-third of *mauzah* Puraini Kalan, the whole of *mouzah* Kankerghat, the whole of *mouzah* Bishenpur Kantahi, and the whole of *mouzah* Ghuneshyampur Pathurghat, of which the last three *mouzahs* at the date of the bond were the property of the *asthal* of Jankinagar, or of the respondent, the *mohant* thereof.

The case was tried in the first instance by the Subordinate Judge of Bhagalpore, who decreed amongst other things, in favour of the plaintiff for the amount sued for, with costs and interest at the rate of 6 per cent. per annum, and further ordered that the amount

* *Present* :—Lord Blackburn, Sir B. Peacock, Sir R. P. Collier, Sir R. Couch and Sir A. Hobhouse.

covered by the bond, as well as that portion of the money included in the running account, amounting to Rs. 3,166-11-6, expended in payment of the Government revenue, dak contribution, and road cess be realized from the mortgaged property, and the remaining amount recovered from Mangal Das, the defendant No. 2, alone, who was also declared to be bound to pay the entire amount of the decree.

Mangal Das did not appeal from the decree of the Subordinate Judge, but the respondent *mohant* Bawan Das appealed to the High Court, who reversed the decree, so far as it affected him, and ordered, amongst other things, that the plaintiff's suit against him be dismissed ; and, further, that the three *mouzahs*, Kankerghat, Bhishenpur Kantahi and Ghuneshyampur Pathurghat, were not liable for any portion of the plaintiff's claim.

It having been decided by the High Court, and by Her Majesty in Council, in a suit brought by the present respondent against Mangal Das, that *mouzah* Puraini Kalan was not the property of the appellant, or of the *asthal* of Jankinagar, the decree of the High Court was silent as to that *mouzah*.

The first question in this appeal is, whether the High Court was right in holding, contrary to the opinion of the Subordinate Judge, that the other three *mouzahs*, in respect of which the decree of the Subordinate Judge was reversed, were not liable to be sold under the mortgage bond of the 12th of May, 1872.

A question was raised before their Lordships, whether the property of the *asthal* was inalienable, except for the benefit of the *asthal* in cases of necessity ; but in the view which their Lordships take of the case, it is unnecessary to determine that question. They will therefore do as the High Court did consider the question, assuming, without deciding, that the three *mouzahs* were not inalienable. In that view of the case the mortgage bond of the 12th of May, 1872, which was executed by Mangal Das, and not by the respondent, did not bind the property, unless Mangal Das had authority, as agent of the respondent, or of the *asthal*, to execute the bond, or the plaintiff was induced by some act or neglect of the respondent, or of the *asthal* to believe that Mangal had such authority, or that he was the actual owner of the property, and, acting under the belief so caused, dealt with Mangal as such agent or owner.

As regards the agency, it seems clear from the evidence, and from the findings of both the lower Courts, that Mangal Das acted as, and was the duly authorized agent of the *asthal*, and of the

1883.

Mohesh Lal v. Mohant Bawan Das.

mohants thereof, and had the management and control of their property from the time of Jairam up to the time of *mohant* Balgobind's death, in or about the months of October or November, 1869.

It was stated correctly by the High Court that an agent's power generally terminates upon the death of his principal, and their Lordships are of opinion that there is nothing to show that Gorib Das, who succeeded Balgobind, or the respondent who succeeded Gorib, ever re-appointed Mangal Das as agent, or led the defendant to believe that Mangal's agency continued.

The Subordinate Judge says: "It appears that, after the death of Balgobind, a dispute arose as to who was to be his successor. Both Mangal Das and Gorib Das were claimants to the succession, but Mangal failed to establish his claim, and Gorib Das obtained certificate of heirship of Balgobind. Mangal then declared himself to be absolute owner of the properties."

The finding of the High Court is to the same effect. They say that Balgobind died in October, 1869, and that the certificate case was decided in favour of Gorib Das, on the 26th of November, 1870.

The Subordinate Judge considered that Gorib Das was bound to give notice to the plaintiff that Mangal's authority as agent had ceased, but the circumstances are such as to render it incredible that the bank was not fully aware of Balgobind's death, and of the termination of Mangal's authority. But whether the plaintiff had or had not notice that the agency had ceased, it is clear that he cannot rely upon such want of notice unless he was thereby induced to deal with Mangal as agent. This the plaintiff did not do, for throughout, after the death of Balgobind, he dealt with Mangal as the proprietor of the estates and as a principal, and not as an agent.

It was held by the Subordinate Judge, and contended at the Bar, that the defendant was estopped from showing that the property mortgaged to the plaintiff in 1872 was not then property of Mangal.

It appears that after Balgobind became *mohant*, a decree for a large amount was passed against him, and there is on the record a registered deed of sale, dated the 15th August, 1860, purporting to have been executed by Balgobind, in favour of Mangal Das, of the three *mouzahs* which were included in the mortgage bond of 1872, and are the subject of this appeal. As regards two of the *mouzahs* which were revenue-paying estates, the third Pathurghat Guneshyampur, being *lakheraj* there was contemporaneously with the deed of sale, a mutation of names, and the name of Mangal Das was substituted in the Collector's register for that of the *mohant* of Janki-

nagar. In the plaintiff's *kothi* also the accounts, which had been previously kept in the name of Balgobind, were, in September, 1861, opened, and from that time kept in the name of Mangal Das.

The following extract from the judgment of the Subordinate Judge explains the grounds of his decision on this part of the case. He says :—

"It is most true, as alleged by the defendant, that Mangal Das was believed by the plaintiff and his agents to be the absolute owner of the whole properties which belonged to the *asthal*. But how were they led to believe so, and who made them to believe the same? It was the defendant's ancestor, Balgobind Das, who put Mangal Das into the position of being the true owner of the *asthal* properties, and allowed him to deal with the plaintiff's firm as such owner. All the properties belonging to the *asthal* were in his name; he had absolute control over them, and no sort of objection was raised by any member of the *asthal* to his power; how, then, could an outsider believe him to be otherwise than a true owner of the *asthal* properties? Under such state of things, I cannot think the defendant can take any advantage of such belief of the plaintiff to deprive him of the money lent to Mangal Das on security of the *asthal* properties."

That argument of the Subordinate Judge is, in their Lordships' opinion, completely answered by the High Court. They say :—

"Although there is no evidence to show that the bill of sale of the 15th August, 1860, was really executed by Balgobind, yet from the fact that, shortly after that date, the name of Balgobind was removed from the Collector's register, and that of Mangal Das placed in its stead, and that the accounts in the plaintiff's *kothi* were transferred from one name to the other, it may be reasonably deduced that Balgobind was fully cognizant of the contrivance of putting the mortgaged property in the *benami* of Mangal Das to protect it against the claims of a certain decree-holder against himself. But the plaintiff was not misled by this fraudulent device. The witness, Mohan Misser, who was the managing *gomastha* of the plaintiff's *kothi* at that time, distinctly admits that the real nature of the transaction was fully disclosed to him by Balgobind, when the transfer of names in the accounts was effected at the instance of the latter.

"We are, therefore, of opinion that, so far as the claim relating to the bond is concerned, the grounds upon which the Subordinate Judge thinks that the parcels of mortgaged property in possession of the appellant are liable, are not tenable."

Nor can it be disputed with success, in the face of the evidence of Baijnath Sahai and of Mohan Misser, both *gomasthas* of the plain-

1883.

Mohesh Lal v. Mohant Bawan Das.

tiff, that, although the dealings in the time of Balgobind were with Mangal Das as principal and not as agent, they were merely nominally so, and that the credit was in reality given to the *asthal* in the name of Mongal Das as trustee and *farzi* for the purpose of concealing the names of the real parties to the transaction.

Mangal was not the real proprietor, and he was not the agent of the defendant No I. These facts must have been known to the plaintiff or to his agents after the certificate case when Mangal repudiated the agency, claimed to be the absolute proprietor, and dealt with the property on his own account.

For the above reasons their Lordships are of opinion that the High Court was right in holding that the bond of the 12th May, 1872, was not binding upon the *asthal* or upon the defendant.

It was further contended on the part of the plaintiff that even if the bond of the 12th May, 1872, was not binding upon the defendant No. 1, the plaintiff was entitled to fall back upon the mortgage bond of the 2nd July, 1869, in favour of Lachminarain, which was binding upon the *asthal* and the *mohants* thereof, inasmuch as it was executed at the time when Mangal was merely the apparent owner for the protection of Balgobind from his creditors and whilst the relationship of principal and agent existed.

This raises the question whether that mortgage was extinguished when Lachminarain was paid, or was intended to be kept alive for the benefit of the plaintiff. Their Lordships are of opinion that it was extinguished.

It has already been shown that, at the time of the execution of the mortgage of the 12th of May, 1872, the relationship of principal and agent which had existed between Mangal and the *asthal* in Balgobind's time had terminated, and that after Balgobind's death Mangal Das claimed to be the *mohant* of the *asthal* in his own right, and the proprietor of the estates. In that mortgage he is described as the proprietor of *mouzah* Puraini, &c., and after a recital, amongst other things, that he has taken a loan from Mohesh Lal of Rs. 20,000 on interest at 1 per cent. per month, of which the sum of Rs. 8,266 8as. was for the payment of the balance of the debt due on Lachminarain's mortgage of 1869, he declares that he will pay in cash, in one lump, the principal with the interest in the month of Jeyt, 1280 Fusli, &c., and further, that until the payment of that money he has mortgaged the estates to Mohesh Lal, &c.

There is nothing in the bond, or in the evidence, or even in the

surrounding circumstances, to show that Mangal intended to keep Lachminarain's mortgage alive, or that he or the plaintiff intended that the latter should hold that mortgage as an additional security for the loan.

On the 15th of May, 1872, the sum of Rs. 8,382, the balance due to the estate of Lachminarain on his mortgage, was paid *through* the plaintiff, and on the deed a receipt for that amount was endorsed in the following words: "Received in full Rs. 8,382 up to the 15th May, 1872, through Mohan Misser, *gomastha* of Babu Mohesh Lal, Mahajun, and returned the bond." The bond was then delivered to the *gomastha*, and was retained by the plaintiff.

It should be remarked that the mortgage to Lachminarain carried interest at the rate of Rs. 1-8 per month, whereas the mortgage to the plantiff was at the rate of Re. 1 per month. It therefore seems to have been the intention of Mangal to borrow money at 1 per cent. per month, partly to pay off and extinguish the mortgage debt at Rs. 1-8 per cent. per month, which was a charge upon the estate which he claimed in this own right. There was no intermediate mortgage between Lachminarain's mortgage and the mortgage to the plaintiff of 1872. Mangal, if the proprietor of the estate, as he then claimed and was stated in the recitals to be, had no interest in keeping alive Lachminarain's mortgage; on the contrary, it was his interest, and he must, therefore, in the absence of any evidence to the contrary, be presumed to have intended, that the mortgage bearing interest at Rs. 1-8 a month should be paid off and extinguished. Nor upon the hypothesis that Mangal was himself the proprietor of the estates had the plaintiff any interest in keeping Lachminarain's mortgage alive, inasmuch as under the mortgage of 1872 he had the security of all the estates included in Lachminarain's mortgage, and it is clear that, even if he had taken an assignment of it, he could not have held it as a security for a higher rate of interest on the new loan than 1 per cent. a month. The only benefit that the plaintiff could have derived from taking an assignment of Lachminarain's mortgage of 1869, was that he might have the benefit of that security if it should turn out that Mangal was not the proprietor of the estates, as he represented himself to be, and, therefore, could not legally charge them. But such an event could not have been contemplated by the plaintiff. It is not probable that Mangal would have admitted his inability to bind the property by the deed of 1872, or would have consented to do

1883.

Mohesh Lal v. Mohant Bawan Das.

any thing which could raise a doubt as to his power to bind the property as a security for so much of the Rs. 20,000 as was in excess of the amount secured by Lachminarain's mortgage. Even if he would have consented, it is not probable that the plaintiff would have advanced the full amount of Rs. 20,000 upon the security of the estates if he had had any doubt as to Mangal's title or right to charge them.

In *Adams* v. *Angell* (1) it was held that the question whether a mortgage paid off was kept alive or extinguished, depended upon the intention of the parties. The Master of the Rolls, in delivering his judgment, stated that, "in a Court of Equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If it is paid off by a tenant for life without any expression of his intention, it is well established that he retains the benefit of it against the inheritance; for, although he has not declared his intention of keeping it alive, it is presumed that his intention was to do so, because it is manifestly for his benefit. On the other hand, when the owner of an estate, in fee, or in tail, pays off a charge, the presumption is the other way, but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in the case of an owner in fee, equity will, in the absence of any declaration of intention, destroy it; but if there be any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it." Applying that rule to the present case, it must be presumed, in the absence of any expression of intention to the contrary, that Mangal, who, when he borrowed the money to pay off Lachminarain's mortgage, claimed to be the owner of the estate, and was stated on the face of the bond to be so, intended that the money should be applied in paying off that mortgage, and in extinguishing the charge, there being no intermediate incumbrance. Although the money was paid by the plaintiff's *gomastha* to Lachminarain's estate, it was paid with money borrowed from the plaintiff by Mangal, and for which Mangal was liable to him. The mortgage was therefore paid off by Mangal, and not by the plaintiff.

It must be presumed that, when the plaintiff lent the money to Mangal to pay off the mortgage, he lent it upon the security expressed in the bond, and for which he stipulated. Equity cannot give him an additional security because the security relied upon turns out

(1) L. R., 5 Ch. D., 634.

to be bad, as regards a portion of the lands included in it. If an equitable transfer of Lachminarain's mortgage is held to have been included in the mortgage of 1872, it must be as a security for the whole Rs. 20,000, and thus the mortgage at Rs. 1-8 per mensem interest, though intended to be paid off, would be a security for Rs. 20,000 at one per cent. a month, contrary to the expressed intention of Mangal to pay it off.

It was contended on the part of the plaintiff that it must have been intended to keep alive Lachminarain's mortgage for the benefit of the plaintiff, because, when he paid the money to Lachminarain's representative, he took possession of and subsequently kept that mortgage deed. Lachminarain's representative was paid by the plaintiff as the banker of Mangal. It was paid, not by the plaintiff as the payer, but through him as the agent of Mangal the payer, and with money lent to Mangal upon the mortgage of 1872. The receipt was written on the mortgage bond in accordance with the terms of the bond, by which it was stipulated that the mortgagor should cause all payments which should be made within or after the stipulated time to be endorsed on the bond, and that besides the payments so endorsed the mortgagor should not claim the benefit of payments made in any other way. It would not have been in the course of business for the plaintiff as Mangal's banker to pay off the mortgage without taking a receipt for the money, or to take a receipt otherwise than by an endorsement on the bond. Having taken that receipt, it was the ordinary course of business for the plaintiff to retain it as a voucher for the payment made by him on behalf of his customer. He could not take, or keep the receipt without taking and keeping the bond on which it was endorsed, and it was therefore necessary for him to take and keep the bond, independently of the course of business, by which an agent paying off a mortgage on behalf of his principal takes back the mortgage on his behalf, instead of leaving it outstanding in the hands of the mortgagee.

Mr. Woodroffe, after the close of his argument, referred to several cases, but none of them show that a mortgage when paid off and intended by the parties to be extinguished, is presumed to have been intended to be kept alive.

Another question is whether the plaintiff is entitled to recover the Rs. 5,849 applied out of the moneys raised by Lachminarain's mortgage in purchasing four small properties, which may be called 8, 9, 10, and 11, and which, by the High Court and by Her Majesty in Council, in a suit brought by the present defendant against

1883.

Mohesh Lal v. Mohant Bawan Das.

Mangal Das, were held to be the property of the *asthal*, because they were purchased with money raised by the mortgage to Lachminarain. Those four properties were not included in the mortgage of 1872, nor are they included in the suit now under appeal. It is difficult to conceive how, if Lachminarain's mortgage was not kept alive and transferred to the plaintiff as a security for his loan of 1872, the right of Mangal, if he had any, against the *asthal* in consequence of the application of Rs. 5,849 raised by that mortgage in the purchase of property now held to be that of the *asthal*, can, in the absence of an express intention to that effect, be presumed to have been included in the mortgage of 1872 as an additional security for the loan of that date. The *asthal* may be liable to Mangal, but that must depend upon the state of accounts between them, as stated by the Judicial Committee, on the 27th June, 1877, in their reasons for the advice given to Her Majesty in Council in the appeal of Mangal Das and the present respondent. Mangal Das, claiming to be the proprietor of the estates included in the mortgage of 1872, retained possession and received the benefits of those estates, as well as of the four small properties purchased with Rs. 5,849. Mangal must render his accounts before he can be held to be entitled to any portion of the Rs. 5,849. Unless Mangal's claim against the *asthal* was included in the mortgage of 1872, and can be held to have been assigned to the plaintiff as a security for the loan, there is no privity between the plaintiff and the defendant No. 1 in respect of the Rs. 5,849.

At all events the plaintiff cannot be entitled to any greater or other rights than those of Mangal in respect of the Rs. 5,849.

It is scarcely necessary to refer to the fact that the plaint does not contain a claim on the part of the plaintiff to recover on Lachminarain's mortgage, or to recover the Rs. 5,849 expended by Mangal in the purchase of the lots above referred to as 8, 9, 10 and 11. This is not a mere technical objection, for, if the claim had been made, or an issue raised relating to it, the defendant No. 1, respondent, might have called witnesses to prove that there was no intention to keep alive Lachminarain's mortgage, or to include it or Mangal's right to the Rs. 5,849, claimed on account of the purchase of lots 8, 9, 10 and 11, in the security to the plaintiff for the loan of Rs. 20,000.

As to the sum of Rs. 3,166-11-6 awarded by the first Court to be realized from the mortgaged estates on account of money expended on account of the payment of revenue, road cesses, &c., on account of the estates, the credit was given to Mangal and not to

the plaintiff, and there is no privity between the plaintiff and defendant No. 1 in respect of it. Mangal may possibly be entitled to it, but that must depend upon the state of accounts between him and the *asthal*, which cannot be taken in the suit now under appeal.

Their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal. The appellants must pay the costs of this appeal.

Appeal dismissed.

NOTE.—This case as well as that of *Gokuldas* v. *Puran Mal*, I L.R. 10 Calc. 1035, are the leading decisions upon the question of the effect of the payment of a charge. The rule may be stated in the words of Lord Macnaghten in *Thorne* v. *Cann* (1895) A. C. 11: "When the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply one of intention. You may find the intention in the deed or in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit, that the charge should be kept on foot." In *Gokuldas* v. *Puran Mal*, the Privy Council held that the mortgage which had been paid off was not extinguished, and could be used as a shield against subsequent incumbrancers. In *Moheshlal* v. *Bawan Das*, on the other hand, the privy Council held that the paid up encumbrance was extinguished, as no intention to keep the prior security alive could be inferred from the circumstances. Reference should be made to the cases of *Adams* v. *Angell*, 5 Ch D., 634 and *Liquidation* v. *Willoughby*, (1898) A. C., 329.

See also *Dinabundhu* v. *Jogemaya*, L. R., 29, I. A. 9, as also the cases of *Surjiram* v. *Barhamdeo*, 2 C.L.J., 202, *Surjiram* v. *Barhamdeo*, 2 C.L.J. 288; *Gurdeo* v. *Chandrika* 5 C. L. J. 611, where the principle of the doctrine of subrogation is explained.

NOAKES & Co., LIMITED

v.

RICE.

[*Reported in* (*1902*) *A.C., 24.*]

The following judgments were delivered:

1901.
December, 17.

EARL OF HALSBURY, L. C.—My Lords, in this case it is suggested that great differences of judicial opinion are apparent upon many of the decisions which are germane to the present appeal. For my own part, I very much doubt whether it is quite accurate so to describe the differences of judicial opinion. In many of the cases, and indeed I think in most of the cases to which our attention has been drawn, the Court has not been in any doubt or difficulty as to the rule, which has been established in the Courts of Equity so firmly that nothing could shake it now, but only as to the application of that rule to different sets of facts.

It is to my mind a very remarkable corroboration of the criticism which I am now making that in that case, upon which doubt appears to have been thrown, namely, that of *Santley* v. *Wilde* (1), my noble and learned friend Lord Lindley's judgment is in these terms—and I do not know that there has been a more authoritative exposition of the rule which arises now than what my noble and learned friend there laid down: "The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt, or the discharge of some other obligation for which it is given. This is the idea of a mortgage; and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption, and is therefore void. It follows from this that 'once a mortgage always a mortgage,' but I do not understand that this principle involves the further proposition that the amount or nature of the further debt or obligation, the payment or performance of which is to be secured, is a clog or fetter within the rule."

(1) [1899] 2 Ch. 474.

My Lords, I cite that case because it appears to me that that lays down the rule; and the differences which are supposed to prevail from time to time appear to me to be only differences of fact or of the modes in which the various Courts have regarded the fact, as to whether a case came within that rule or not. But I do not believe that there is any portion of that which my noble and learned friend laid down in the case which I have cited that has been the subject of doubt or difficulty in any Court whatever.

My Lords, I find that the same question has arisen and has been very learnedly discussed in the Irish Courts lately, in the case of *Browne* v. *Ryan* (1), and certainly that case is extremely relevant to the question which your Lordships are now discussing, because in truth it arose upon what practically are the facts of this case, and the learned Judges in the Court of Appeal have arrived at the same conclusion as that at which I invite your Lordships to arrive. FitzGibbon, L. J., in his judgment (and also Holmes, L. J.), in referring to the case which I have just cited, appears to consider that that case is inconsistent with the rule which they themselves lay down. I confess I am unable to find any inconsistency. It may be that my noble and learned friend Lord Lindley took a different view of the facts in the case to which he was then referring from that which they would have taken, but that is not a difference in the law; and in this case it appears to me, as in the case which was argued in the Court of Appeal in Ireland, it is almost impossible, if the rule laid down by Lord Lindley there is the rule upon which the Courts must act, to deny that there is here a fetter or clog, or whatever figurative word may be used, to prevent that which, according to the known state of the law, is to be enforced, namely, that the person who has pledged his estate for the payment of a debt shall, upon redemption, be entitled to have that estate back again unfettered and unclogged by anything that shall prevent his exercising the right which the law insists upon his being permitted to have.

Under these circumstances, my Lords, it is and must be in each case a question of the particular thing which is advanced as a clog or a fetter, and in some cases it may seem to come very near the line. Whatever rule is laid down one can reduce it to something like an absurdity by taking an extreme case. But, my Lords, taking this case, it appears to me that undoubtedly this was a mortgage, and that the equity of redemption is clogged and fettered here by

(1) [1901] 2 I. R., 655.

1901.

Noakes & Co., Limited v. Rice.

the continuance of an obligation which would render this house less available in the hands of its owner during the whole period and beyond the whole period of the term, apart from the realization of the security. Under those circumstances, as a matter of the merest and simplest reasoning, I am wholly unable to come to any other conclusion than that there is a clog and fetter here which the law will not permit.

That seems to me, my Lords, to be the whole of this case, and, apart from the attempt to determine the sources from which this rule of law or equity was arrived at, it seems to me that this case is capable of being disposed of very summarily in that way. I care not what the sources of the rule were—I care not what difference of fact there may have been in other cases—what I say is, here is a case strictly within the rule, and looking at the facts of this case and applying to it one's ordinary knowledge of what would be the effect upon the property which was made the pledge, and which has to be restored free and unfettered to its owner, I cannot entertain a doubt that this did, and did intentionally, place a clog and fetter upon the right of redemption which it is the policy of the law as announced by the Courts of Equity to insist shall not be taken away by anything in the nature of a mortgage.

Under these circumstances, I move your Lordships that this appeal be dismissed with costs.

Lord Macnaghten.—My Lords, I am of opinion that the judgment of Cozens-Hardy, J., affirmed by the Court of Appeal, is perfectly right.

Redemption is of the very nature and essence of a mortgage, as mortgages are regarded in equity. It is inherent in the thing itself. And it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. It follows as a necessary consequence that, when the money secured by a mortgage of land is paid off, the land itself and the owner of the land in the use and enjoyment of it must be as free and unfettered to all intents and purposes as if the land had never been made the subject of the security.

In the present case it is hardly necessary to appeal to this principle. The mortgage deed under consideration expressly and in terms provides that on repayment of the money advanced the mortgagees are to reconvey the mortgaged premises to the mortgagor, or as he shall direct. That, of course, means that the land is to be reconveyed

freed and discharged from all burthen and liability in respect of or arising out of the contract under which the advance was made.

Mr. Haldane, in his reply, felt the difficulty of his position so much that he was driven to contend that the subject of the security was a "tied" public-house, and that, therefore, the mortgagor could only get back his property subject to a pre-existing "tie" in favour of the brewers. But to this, as was pointed out in the Court of Appeal, there are two answers. In the first place, the argument has no foundation in fact. Nothing can be plainer than this, that it was the object and intention of all parties that the property should be set free from the old "tie" attached to it in the hands of its former owner, and that it should be mortgaged to the appellants as a free public-house. In the next place, if the tie is invalid after redemption now, the old tie could not have subsisted after the former mortgage was paid off.

Since the argument, my attention has been called to the case of *Browne* v. *Ryan* (1), recently decided by the Court of Appeal in Ireland. There a farmer mortgaged his holding to secure 200*l.* and interest; and, as part of the mortgage transaction, it was stipulated that the mortgagor should sell his holding within twelve months, employ the mortgagee as the auctioneer at a certain commission, and pay him the like commission if the conduct of the sale was given to any one else. The Court of Appeal held, and, in my judgment, rightly held, that the stipulation had no effect after redemption. The judgments of the learned Judges in the Court of Appeal seem to me, if I may venture to say so, to contain a very clear exposition of the law. They had occasion to consider the judgment of the English Court of Appeal in *Santley* v. *Wilde* (2), and they expressed their disapproval of the conclusion at which the English Court arrived. My Lords, speaking for myself, with all difference to my noble and learned friend opposite, Lord Lindley, I cannot help sharing that view. I do not in the least dissent from the propositions laid down by my noble and learned friend, taking them separately. But the transaction in that case seems to me to have been nothing more than an ordinary mortgage to secure an advance of money, with a superadded obligation offending against the settled principles of equity, in that it rendered redemption impossible. It seems to me to be contrary to principle that a mortgagee should stipulate with his mortgagor that after full payment of principal, interest, and costs, he should continue to receive, for

(1) [1901] 2 I.R., 655. (2) [1899] 2 Ch., 474.

1901.

Noakes & Co., Limited v. Rice.

a definite or an indefinite period, a share of the rents and profits of the mortgaged property as the result of an obligation arising from the contract made when the mortgage was created. Nor can I agree with the president of the Probate Division, who appears to have thought that *Santley* v. *Wilde* (1) was covered by the decision in *Biggs* v. *Hoddinott* (2), a decision to which, as it seems to me, no objection can be taken.

If there is an expression in Cozens-Hardy, J 's judgment to which I do not cordially assent, it is one in the last paragraph but one of his judgment, where the learned judge seems to refer to this tie as "an equity attached to the property," or as an "equitable burden." I rather doubt whether such an obligation can be made to run with the land or can be imposed on the owner in respect of the property except as between lessor and lessee, or, in the case of a mortgage, during the continuance of the security.

I concur in thinking that the judgment should be affirmed.

Lord Shand.—My Lords, I am of the same opinion. For the reasons stated by Cozens-Hardy, J., by the Court of Appeal, and by your Lordships, I am of opinion that the judgment appealed from should be dismissed.

Lord Davy.—My Lords, there are three doctrines of the Courts of Equity in this country which have been referred to in the course of the argument in this case. The first doctrine to which I refer, is expressed in the maxim, "once a mortgage always a mortgage." The second is that the mortgagee shall not reserve to himself any collateral advantage outside the mortgage contract; and the third is that a provision or stipulation which will have the effect of clogging or fettering the equity of redemption is void.

My Lords, the first maxim presents no difficulty: it is only another way of saying that a mortgage cannot be made irredeemable, and that a provision to that effect is void. In the case of the *Marquis of Northampton* v. *Salt* (3), the question was whether a certain life policy, the premiums on which were charged against the mortgagor, was comprised in the mortgage security. That question having been decided in the affirmative, it was declared to be redeemable, notwithstanding an express provision to the contrary contained in the deed.

My Lords, the second doctrine to which I refer, namely, that the mortgagee shall not reserve to himself any collateral advantage outside the mortgage contract, was established long ago when the usury laws were in force. The Court of Equity went beyond the usury

(1) [1899] 2 Ch., 474. (2) [1898] 2 Ch., 307. (3) [1892] A. C., 1.

laws, and set its face against every transaction which tended to usury. It therefore declared void every stipulation by a mortgagee for a collateral advantage which made his total remuneration for the loan indirectly exceed the legal interest. I think it will be found that every case under this head of equity was decided either on this ground, or on the ground that the bargain was oppressive and unconscionable. The abolition of the usury laws has made an alteration in the view, the Court should take on this subject, and I agree that a collateral advantage may now be stipulated for by a mortgagee, provided that no unfair advantage be taken by the mortgagee which would render it void or voidable, according to the general principles of equity, and provided that it does not offend against the third doctrine. On these grounds I think the case of *Biggs* v. *Hoddinott* (1) in the Court of Appeal was rightly decided.

The third doctrine to which I have referred is really a corollary from the first, and might be expressed in this form: Once a mortgage always a mortgage and nothing but a mortgage. The meaning of that is that the mortgagee shall not make any stipulation which will prevent a mortgagor, who has paid principal, interest, and costs from getting back his mortgaged property in the condition in which he parted with it. I do not dissent from the opinion expressed by my noble and learned friend opposite (Lord Lindley), when Master of the Rolls, in the case of *Santley* v. *Wilde* (2). He says: "A clog or fetter is something which is inconsistent with the idea of security; a clog or fetter is in the nature of a repugnant condition." But I ask, "security" for what? I think it must be security for the principal, interest, and costs, and, I will add, for any advantages in the nature of increased interest or remuneration for the loan which the mortgagee has validly stipulated for during the continuance of the mortgage. There are two elements in the conception of a mortgage: first, security for the money advanced; and, secondly, remuneration for the use of the money. When the mortgage is paid off the security is at an end, and, as the mortgagee is no longer kept out of his money, the remuneration to him for the use of his money is also at an end. I confess I should have decided the case of *Santley* v. *Wilde* (2) differently from the way in which it was dealt with in the Court of Appeal. After the payment of principal and interest, and everything which had become payable up to the date of redemption, the property in that case remained charged with the payment to the mortgagee of one-third share of the profits, and

(1) [1898] 2 Ch., 307. (2) [1899] 2 Ch., 474.

1901.

Noakes & Co., Limited v. Rice.

the stipulation to that effect should, I think, have been held to be a clog or fetter on the right to redeem. The principle is this—that a mortgage must not be converted into something else; and when once you come to the conclusion that a stipulation for the benefit of the mortgagee is part of the mortgage transaction, it is but part of his security, and necessarily comes to an end on the payment off of the loan. In my opinion, every yearly or other recurring payment stipulated for by the mortgagee should be held to be in the nature of interest, and no more payable after the principal is paid off than interest would be. I apprehend a man could not stipulate for the continuance of payment of interest after the principal is paid, and I do not think he can stipulate for any other recurring payment such as a share of profits. Any stipulation to that effect would, in my opinion, be void as a clog or fetter on the equity of redemption.

By the Conveyancing Act a mortgagee may now be required to transfer his mortgage on payment of what is due to him, and he must then transfer all his security, including every advantage which he derives from the mortgage transaction, and all his deeds and documents constituting his title as mortgagee. And on redemption he must do the like to the mortgagor, and any stipulation which varies the effect and incidents of redemption on payment off of what is due on the loan is a clog whithin the meaning of the rule.

Now, applying what I have said to the present case, the decision becomes easy. In the first place, I do not think that the respondent's covenant to deal exclusively with the brewers continued after the payment off of the loan and the redemption; and, secondly, if it did, it was an attempt to charge it on the property, and that constituted a clog or fetter which, according to well-established principles, was void.

My Lords, I only desire to add that, with my noble and learned friend by my side (Lord Macnaghten), I cannot assent altogether to the assumption made by Cozens-Hardy, J., that the covenant constituted or might constitute a good charge upon the property by virtue of the operation of the doctrine in *Tulk v. Moxhay* (1). I should hesitate some time before I assented to that proposition; but it is perfectly immaterial for the decision in the present case, because, as I have already said, I think that the covenant did not continue after the redemption, and that the mere attempt to make it a charge on the property would render it void.

(1) [1848] 2 Ph., 774.

My Lords, upon these grounds I agree with the motion proposed by my noble and learned friend.

Lord Brampton.—My Lords, I am so satisfied in my own mind with the judgment pronounced by Cozens-Hardy, J., and by the Court of Appeal, and the judgment already proposed to this House by my noble and learned friends, that I think I should be wasting your Lordships' time if I were to add anything to them beyond expressing my concurrence.

Lord Robertson.—My Lords, I concur.

Lord Lindley.—My Lords, I agree in thinking that the covenant contained in this mortgage, and by which the mortgagees have attempted to convert the house mortgaged from a free public-house into a tied public house even after redemption, is invalid. I see no answer to the objection taken to it that upon payment off of the mortgage money the mortgagor cannot get back what he mortgaged, namely, a free public-house. The attempt to strengthen the tie by stipulating for liquidated damages and charging them on the property certainly does not mend matters, but makes them worse.

The case before us is not like the case of a mortgage of wasting property, *e.g.*, a lease which, owing to its nature, cannot be given back on redemption in the state in which it was mortgaged. Here the mortgage contains a covenant the object of which is to disentitle the mortgagor on redemption from having back the property unfettered by that covenant. This is inconsistent with the settled law of mortgage.

I regard the mortgage deed in this case as another unsuccessful attempt to lay a new burden on land not warranted by law or by the doctrine laid down by *Tulk* v. *Moxhay* (1), which has often lately been relied upon as going much further than it does.

The conclusion thus arrived at is not inconsistent with *Santley* v. *Wilde* (2), on which the appellants so strongly rely. Some of your Lordships think that case went too far. I do not think so myself; but I will not trouble your Lordships with its details, which were complicated. The principle on which the Court of Appeal decided the case was, I still think, sound. Whether it was properly applied in that case is now of no importance. I believe the true principle applicable to these cases to be that expounded by the Court of Appeal in *Biggs* v. *Hoddinott* (3) and *Santley* v. *Wilde* (2). That principle is perfectly consistent with a real pledge and with the

(1) [1848] 2 Ph., 774. (2) [1899] 2 Ch., 474.

(3) [1898] 2 Ch., 307.

1901.

Noakes & Co., Limited v. Rice.

maxim "Once a mortgage always a mortgage"; but it will not render valid the covenant which your Lordships have to consider in the present case.

I agree that this appeal ought to be dismissed with costs.

As regards the recent case of *Browne* v. *Ryan* (1) in Ireland, I am not satisfied that the Court of Appeal did not go too far in holding that the plaintiff's action for damages could not be sustained.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

(1) [1901] 2 I.R., 653.

NOTE.—This case affirms the principle that the equity of redemption may not be clogged with a bye-agreement, or in other words, that a mortgagee shall not derive any collateral advantage beyond principal and interest. Any stipulation which precludes the mortgagor on payment of the mortgage money and interest from getting back his property in the condition in which it was when he parted with it, is held to be invalid. Reference may be made to other leading English decisions on the point, namely, *Chambers* v. *Goldwin*, 9 Ves., 254, and *Salt* v. *Marquis of Northampton*, (1892) A.C.1. See also an article on the Law Quarterly Review, Vol. II, p. 152.

The rule has been applied to this country, see for instance, *Rajmal* v. *Shivaji*, I.L.R. 27 Bom. 154.

A stipulation for the right of pre-emption is apparently not within the mischief of the rule. Coote on Mortgages, 5th Edition, p. 20; Fisher on Mortgages, Sec. 1397; *Ramasami* v. *Chinnan*, I.L.R. 24 Mad. 449.

LALA ACHAL RAM

v.

KAZIM HUSAIN KHAN.*

[*Reported in, I.L.R., 27 All., 271 ; L. R., 32 I. A., 113.*]

1905.

February, 9.

The judgment of their Lordships was delivered by

Lord Macnaghten.—This is an appeal from a judgment and decree of the Court of the Judicial Commissioner of Oudh, reversing the decision of the Court below, and awarding to the respondent Raja Kazim Husain Khan possession of one-half of the taluq Birwa Mehnon.

The taluq was granted to one Pirthipal after the confiscation. It was placed in classes 1 and 2, but not in class 3 of Act I of 1869. The taluq, therefore, is one that devolves upon a single heir, though not descending according to the rules of lineal primogeniture.

Pirthipal died in the year 1859. He left a widow and a daughter, but no male issue. He was succeeded by his widow. She died in 1870, and then the daughter inherited the estate. Upon her death on the 23rd of February, 1879, the succession opened to collaterals of Pirthipal.

The appellant Achal Ram was the husband of Pirthipal's daughter. On his wife's death he took possession. He was beset by litigation. But with the exception of a short interval following his dispossession by a claimant who succeeded in the Court of the Judicial Commissioner, but failed before this tribunal, he managed to hold sole possession against all comers until the decree now under appeal was pronounced.

The respondent Raja Kazim Husain Khan claims to be entitled to one moiety of the estate under a purchase from Ardawan Singh, who has been held to be the heir of the nearest collateral of Pirthipal living at the daughter's death.

The present suit was brought by Ardawan and the Raja suing as co-plaintiffs. Ardawan afterwards withdrew from the case. He is said to have been bought off by Achal Ram. At any rate, at his own request and on the allegation that he was satisfied his case was baseless, his name was struck off the record. Then arose the question whether the Raja could sue alone, and it was held that he could.

* *Present.*—Lord Macnaghten, Lord Lindley, Sir Andrew Scoble and Sir Arthur Wilson.

1905.

Lala Achal Ram v. Kazim Husain Khan.

A great number of objections were raised by Achal Ram by way of defence. All but two are disposed of, either by decisions of this Board or by concurrent findings which the appellant is not in a position to contest. The two remaining objections are these :—In the first place it is contended that the sale to the Raja was void as being champertous and "gambling in litigation" contrary to public policy. Then it is objected that there is a branch of the family senior to that to which Ardawan belongs, and that in it there are to be found collaterals nearer than Ardawan. This branch traces descent from a remote ancestor, Azmat Singh, the younger son of a powerful chieftain called Dutt Singh, from whose brother Ardawan is descended. The sole question on this part of the case is whether Azmat passed out of the family by adoption. On this point, as well as on the question of champerty, the Court of the Judicial Commissioner differed from the Court of first instance, which held the sale-deed void and the adoption not proved.

The sale-deed is dated 11th August, 1888. In it Ardawan states his title by succession, the impossibility of recovering possession from Achal Ram without a suit, and his own inability to sue owing to want of money. "So therefore," he goes on to say, he has sold half the estate to the Raja for a lac and a half of rupees. He acknowledges the receipt of one lac. The balance of Rs. 50,000 is to remain on deposit with the Raja to be expended in prosecuting the proposed suit and in paying a monthly stipend of Rs. 50 to himself and Rs. 20 to a mukhtar. On the termination of the litigation he is to receive the balance. In the suit the Raja and he are to act and work jointly and the Raja is given full power to conduct the litigation and manage the expenditure.

Now at the date of the sale-deed the position of things was this. Achal Ram was in possession. A suit to recover the estate had been brought against him by one Narendra who apparently would have been entitled as the heir of his father Harbhagat Singh if the succession had opened on the death of Pirthipal's widow. That suit had been dismissed by the Subordinate Judge on the ground of limitation. The dismissal had been affirmed by the Judicial Commissioner on a different ground and an appeal was then pending to the Privy Council. It seems that the Raja had bought one moiety of the estate from Narendra under a deed of sale framed on the same lines as Ardawan's deed while Narendra and Ardawan had come to some arrangement for dividing the estate between them in case either the one or the other should succeed against Achal Ram.

The statement in the sale-deed to the effect that one lac had been

paid to Ardawan was not in accordance with the fact. Indeed it seems inconsistent with the scope of the deed. It is hardly conceivable that any body in the position of the Raja would pay down without any security so large a sum to a man confessedly without means. And besides it is obvious that if it had been intended that Ardawan should receive a lac of rupees at once, there would have been no occasion to provide a monthly allowance for his "personal expenses." Probably the statement was introduced by the draftsman under the notion that it might impart some additional solemnity to the instrument. Of course, at the first blush, the untrue statement throws suspicion upon the whole transaction. But after all, so long as the deed stands, it is no concern of Achal Ram's that Ardawan may have a grievance on the score of a mis-statement in an instrument to which Achal Ram is no party. Ardawan himself has taken no steps to impeach the deed. On the contrary, in the course of the two years that elapsed between the date of the deed and the institution of the suit (which was delayed as long as possible in order to await the result of Narendra's appeal) Ardawan more than once affirmed the transaction, claiming and receiving his monthly allowance under the deed and urging the Raja's agent to commence proceedings without delay. It is not enough for Achal Ram to make out that the sale-deed is voidable at the option of Ardawan. He must show that it was and is absolutely void. But now Achal Ram is in this further difficulty, that, according to Ardawan's petition of compromise which he puts forward as part of his case, Ardawan has nothing to complain of, for he had nothing to sell. It may be added that the Raja did all in his power to procure the attendance of Ardawan at the trial, but he was kept out of the way.

Apart from the untrue recital in the sale-deed there seems to be no flaw in the transaction. Without assistance Ardawan could not have prosecuted his claim. There was nothing extortionate or unreasonable in the terms of the bargain. There was no gambling in litigation. There was nothing contrary to public policy. Their Lordships agree with the judgment of the Court of the Judicial Commissioner that the transaction was a present transfer by Ardawan of one moiety of his interest in the estate, giving a good title to the Raja, on which it was competent for him to sue.

The question of Azmat's adoption is not quite so simple a matter. The adoption, if it took place, occurred before the year 1681 A. D. when Azmat succeeded to the Mankapur Raj. At this distance of time it is of course impossible to prove that all the requisite ceremonies were duly and regularly performed. On the

1905.

Lala Achal Ram v. Kazim Husain Khan.

one hand, it is not disputed that Azmat and his descendants, successors in the Raj, remained Bisains, though the adoption, if it took place, was an adoption into the Bandhalgoti clan, a clan much inferior in social position to the Bisains. It appears that on the death of a member of the Mankapur family, the ceremonies usual on the death of a relative are observed among the Bisains of Birwa Mehnon, a circumstance unusual in the case of an adoption out of the family, though, it is said, not unprecedented.

On the other hand, there is a body of tradition strong and persistent in favour of the adoption, and there is a story still current which may possibly serve to throw some light on the transaction. It is said that on Azmat's birth there was a prophecy put about to the effect that the child would become a Raja within eight days. His father, Dutt Singh, alarmed for the safety of himself and his eldest son, contemplated removing the danger in a summary manner, but a better way was found of defeating or fulfilling the prophecy. The Rani of Mankapur, a sister of Dutt Singh's wife, whose son, Partab Singh, the last of his line, had recently died without issue, leaving a wife who became a *Sati* with her husband, out of affection for her nephew or her nephew's mother or through fear of her powerful neighbour, was ready to adopt the child to succeed her in the Raj of Mankapur.

The tradition of the adoption is preserved in the *wajib-ul-arz* of mauza Ashrufpur, Pargana Mankapur, and is to be found recorded in the Oudh Gazetteer and the Gonda Settlement Report.

It is to be observed that in no previous litigation did Achal Ram ever suggest that collaterals nearer in degree were to be found in Azmat's line. On the contrary he filed evidence tending to show Azmat's adoption. It is still more significant that no claim to the taluq Birwa Mehnon has ever been set up by any member of the Mankapur family.

On the whole their Lordships see no reason to differ from the conclusion at which the Court of the Judicial Commissioner has arrived. It seems to them that the evidence in favour of adoption preponderates.

Their Lordships, therefore, will humbly advise His Majesty that the appeal should be dismissed.

The appellant will pay the costs of the appeal.

Appeal dismissed.

1905.

Lala Achal Ram v. Kazim Husain Khan.

NOTE.—This decision of the Judical Committee affirms the principle, that where the plaintiff in ejectment claimed under a transfer from the true owner, the deed of sale containing an untrue statement as to the payment of the purchase money, but being otherwise reasonable in its terms, and affirmed and acted upon by both vendor and purchaser, and neither champertous nor contrary to public policy, the deed operates as a present transfer to the plaintiff, giving him a good title on which it was competent to him to see; it lay on the defendant to show that it was absolutely void and not merely voidable at the option of the transferor. For other similar cases on the point, reference may be made to *Manogi* v. *Sarat*, 4. C. L. J. 334, and *Sarat* v. *Hari*, 4 C. L. J. 338. The leading case was applied in *Rupchand* v. *Sarveswar*, I. L. R. 33 Calc. 915; 3 C. L. J. 629.

BENI RAM

v.

KUNDAN LAL.*

[*Reported in I. L. R., 21 All., 496.*]

Their Lordships' judgment was delivered by—

1899.
March, 11.

LORD WATSON —In November, 1858, Bhawain Das, and Dhani Ram, bankers of Hathras, and owners of the *mauza* Ramanpur, let to five tenants, whose interests are now represented by the respondents in this appeal, six bighas of land, for the term of the current settlement, for the construction thereon of a saltpetre factory, at the annual rent of Rs. 28. The conditions of the lease appear from the *qabuliyat* executed by the tenants, on the 17th November, 1858, which, so far as material, are as follows :—"That, until the lease money is continued to be paid, the *malguzars* (persons who pay the revenue) shall not be competent to dispossess me within the foresaid term nor shall I be competent within it to give up the land. After the settlement, the parties shall be bound to carry out the order of the Government, if any, issued by it. I have therefore executed these presents, by way of a *qabuliyat*, in order that they may serve as evidence, and be of use in time of need."

The appellants having acquired by purchase, the interest of the original lessors, on the 1st August, 1859, served a notice upon the respondents requiring them to quit possession of the lands upon the 30th June, 1890. The respondents did not comply with the notice ; and the appellants, on the 30th August, 1890, brought a suit for their ejectment in the Court of the Munsif of Hathras. The plaint *inter alia* craves decree for removal of the material of the houses built by the ancestors of the respondents lying on the said lands.

The respondents, in their written statement, amongst other defences to the action, pleaded that the predecessors of the appellants, "after the completion of the saltpetre factory for which the lands were taken on lease, saw that from time to time houses were built, and the defendants, and the ancestors of the defendants, spent several thousands of rupees on building, and they instead of objecting, or prohibiting, induced the defendants and their ancestors to build.

The Munsif received evidence on nine issues, but in his judgment, which was given on the 29th June, 1886, he only

* *Present*—Lord Watson, Lord Hobhouse, and Sir Richard Couch.

dealt with the first and second of them. Upon the first, which related to an amendment obtained by the appellants, he found in their favour. Upon the second, he found that the notice of removal given by the appellants upon the 1st August, 1889, was not according to law. With regard to the remaining issues, from three to nine inclusive, the learned Judge observed :—"There is sufficient material to dispose of all these issues, but since issue No. 2 is decided against the plaintiffs, and it is held that the suit must fail, there is no further necessity to enter into the trial of these issues." Accordingly, in respect of his finding upon his second issue, he dismissed the suit.

An appeal was taken from the Munsif's judgment to the first appellate Court, being that of the Subordinate Judge of Aligarh, who, on the 21st April, 1892, affirmed the decree appealed from, although on a different ground. The Subordinate Judge dealt with three issues, the first and third having reference to the validity of the notice upon which the action of ejectment was based, and the second being :—"Was the land in dispute only let for the construction of a saltpetre factory, and what is the effect of the plaintiffs or their predecessors having acquiesced in the defendants or their predecessors having built upon the land after the saltpetre factory had ceased to exist ?"

The Subordinate Judge, differing in opinion from the learned Munsif, held that the notice to quit possession, which the appellants had given, was valid in law. Upon the second issue, he found the following facts, upon which the decision of this appeal has come to depend :—"The tenancy, as I have already stated, was originally created for the construction of a saltpetre factory, but we have the evidence of the plaintiffs' own witness Khyali Ram, and Chokey Lal, patwari of the village, to show that saltpetre was only manufactured here for four or five years ; that since 20 years shops have existed on the land, and that since 12 or 14 years pucca shops have been built. Inside the enclosure, the evidence shows, are rooms (?) erected 18 or 20 years ago, a pucca as well as a kutcha well. It is also proved in the most unmistakeable manner that the former owner of the land saw the buildings and did not prohibit their construction. The plaintiffs' evidence, moreover, shows that, even on their calculations the buildings cost Rs. 1000, or Rs. 1,500. The evidence of Gobind Prasad, their witness, is that the buildings cost about Rs. 900. Jugal Kishore makes them worth Rs. 800. Khyali Ram says nothing on the point, while the patwari deposes that the buildings are worth

1899

Beni Ram v. Kundan Lal.

Rs. 1,000 or Rs. 1,500. On the other hand, the defendant Kundan Lal and his witnesses' evidence shows that there are 12 shops, some kutcha and some pucca, now standing on this land; that they have been built between Sambat 1918 and 1935; that in addition to the shops are dalans and kothas, two wells, the one kutcha and the other pucca, and a temple, all costing between three and four thousand rupees. The evidence also shows in the most unmistakeable manner, that not only did the original lessee not object to the enclosing of these buildings when they were being erected, and stood by, but that by continuing to receive rents from the lessees, even after the erection of the buildings, and even though the saltpetre factory, for which the land was let, had ceased to exist, he sanctioned the lessees doing so. His successors are therefore equitably estopped from now suing for the lessees' ejectment. The case is governed by what was said in *Gopi* v. *Bisheshwar* (1).

The rule or principle thus adopted by the Subordinate Judge, which is reported to have been laid down in *Gopi* v. *Bisheshwar* (1), is thus stated by him :—"If a man permits another to build upon his land, and, with the knowledge that the building is being erected, stands by and does not prevent the other from doing so, then, no doubt, equity comes in, and by the rules of equity which in this respect are the same as the rules of law, he cannot eject that other person."

The case was then carried, by the present appellants, before the second appellate tribunal, the High Court at Allahabad, who, on the 26th January, 1894, confirmed the decision of the Subordinate Judge of Aligarh and dismissed the appeal, with costs. The learned Judges of the High Court, without entering into any discussion of the other issue which the first appellate Court had decided in favour of the present appellants, said :—"We need not go further into the construction that should be placed upon that lease, because we are of opinion, that upon the finding of acquiescence, which we think was a right finding in this case, the appeal will have to be dismissed." They accordingly disposed of the appeal on that ground alone.

It is to be regretted that the loose and inadequate statement of the rule of equity, which is reported in *Gopi v. Bisheshwar* (1) should have been accepted, apparently without much consideration, by the learned Judges of both appellate Courts. The proposition, if it were carefully supplemented, might possibly be made to apply to

(1) Weekly Notes for 1885, p. 100

the case where the owner of land sees another person erecting buildings upon it, and knowing that such other person is under the mistaken belief that the land is his own property, purposely abstains from interference, with the view of claiming the building when it is erected. The findings of fact pronounced by the Subordinate Judge, which were conclusive in the second appellate Court, and are equally binding upon this Board, show that the present is not a case of that kind. The respondents knew that the predeccssors of the appellants were the owners of the land let, and that their own title was limited to their occupation of the land as tenants, upon the terms and for the periods provided by the original lease of 1858. In order to raise the equitable estoppel which was enforced against the appellants by both the appellate Courts below, it was incumbent upon the respondents to show that the conduct of the owner, whether consisting in abstinence from interfering, or in active intervention, was sufficient to justify the legal inference that they had, by plain implication, contracted that the right of tenancy, under which the lessees originally obtained possession of the land, should be changed into a perpetual right of occupation.

Their Lordships have had no difficulty in coming to the conclusion that the respondents have failed to discharge themselves of that *onus*. If there be one point settled in the equity law of England, it is, that in circumstances similar to those of the present case, the mere erection by the tenant of permanent structures upon the land let to him, in the knowledge of and without interference by his lessor, will not suffice to raise the equitable right against the latter which has been affirmed by the Courts below. It must also be kept in view that, in Indian law, the maxim "*quicquid inaedificatur solo, solo cedit*," has no application to the present case. The rule established in India is that of section 108 of the Transfer of Property Act, which provides that "the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth; provided he leaves the property in the state in which he received it."

The leading authority of the law of England upon the point, is *Ramsden* v. *Dyson and Thornton* (1). In that case, the Vice-Chancellor (Sir J. Stuart) had held that Sir J. Ramsden, the owner, was estopped in equity from bringing ejectment against the defendants, his tenants, by reason of the defendants, having been permitted, in the knowledge of their lessor, to build valuable

(1) [1865] L.R., 1 E. & I.A., 129.

1899.

Beni Ram v. Kundan Lal.

and permanent structures upon the land demised to them. The judgment of the Vice-Chancellor was reversed in the House of Lords, by the Lord Chancellor (Cranworth), Lord Wensleydale and Lord Westbury, *dissentiente* Lord Kingsdown.

The Lord Chancellor (p. 141 of the report) said :—"It follows as a corollary from these rules, or, perhaps, it would be more accurate to say it forms part of them, that if my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end." The noble and learned Lord, in his opinion, which is expressed at considerable length, appears to me to indicate some at least of the special circumstances which might suffice to raise an estoppel against the lessor. It was strongly urged for the defendants, at the Bar of the House, that Sir J. Ramsden had made representations "which might fairly be supposed to lead his tenants at will or from year to year to expend money in building, in the belief that by building they acquired a title which he could never disturb." I do not find that the noble and learned Lord indicated any opinion that, if such representations had actually been made by the lessor, they would not have been sufficient to show the terms of a contract which might be enforced in a Court of Equity. But he rejected the plea on the double ground (*i*) that the alleged communications were not proved to have been sufficient for that purpose, and (*ii*) that the representations, if they had been sufficient to raise an implied contract, were not binding upon the lessor, inasmuch as they proceeded from an estate agent, and were not shown to have been made by him, in the knowledge and with the authority of the lessor.

The respondents, in their appeal case lodged before this Board, relied exclusively upon their plea of acquiescence, which had been sustained by both the appellate Courts below. In their argument, the learned Counsel by whom they were represented ably urged that plea, but frequently digressed into other points raised in the case, always with the explanation that these digressions were meant to aid the plea of acquiescence. They also argued that their Lordships could not competently disturb the judgment to the effect that there had been acquiescence, inasmuch as it was a concurrent finding of the appellate Courts. The argument was palpably erroneous. Their Lordships were bound

by, and have accepted as final, the findings of the Subordinate Judge of Aligarh upon the facts from which acquiescence might or might not be inferred. But acquiescence is not a question of fact, but of legal inference from the facts so found; and upon it the judgments of the appellate Courts are not final.

Their Lordships will therefore humbly advise Her Majesty to reverse all the judgments appealed from, and to give the appellants decree of ejectment in terms of their plaint; to order that the costs, if any, already paid by the appellants, under the decrees respectively of the Munsif of Hathras, the Subordinate Judge of Aligarh, and the High Court at Allahabad, be repaid to the appellants by the respondents; and that there be no costs of suit in the Courts below paid to or by either of the parties. The respondents must pay to the appellants the costs of this appeal.

Appeal allowed.

NOTE.—This decision of the Judicial Committee affirms the principle that lessors are not estopped in equity from bringing ejectment, merely by reason of their tenants having erected permanent structures upon the land leased, in the knowledge of and without interference by the lessors. This decision is founded upon that of the House of Lords in *Ramsden* v. *Dyson*, L. R. 1 H. L., 129, which lays down two propositions of great importance: *first*, if a stranger begins to build on land supposing it to be his own, and the real owner perceiving his mistake, abstains from setting him right and leaves him to persevere in his error, a Court of Equity will not afterwards allow the real owner to assert his title to the land; but *secondly*, if a stranger builds on land, knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land with the benefit of all the expenditure on it, because there is nothing in his conduct, active or passive, which makes it inequitable in him to assert his legal rights. For a remarkable application of these principles, see *Ismail Khan* v *Jaigun Bibi*, I. L. R. 27 Calc. 570, where the Calcutta High Court, in the case of homestead lands in Kidderpore, held that as the tenancy was created by a Kabulyat the terms of which did not amount to a permanent grant, the tenant was liable to eviction though he had been in possession for half a century and had erected masonry buildings with the knowledge of and without any protest from the landlord. In later similar cases, however, the Privy Council have held that the Kabulyats created permanent tenancies, and the landlord was not entitled to eject the tenants. (*Upendra* v. *Ismail*, I. L. R. 32 Calc. 41; *Nilratan* v. *Ismail*, I. L. R. 32 Calc. 51; *Nabakumari* v. *Behari*, I.L. R. 34 Calc. 902). For other applications of the principles laid down in the leading case, reference may be made to *Ismail* v. *Nasar Ali*, I. L. R. 27 Mad. 211, and *Dharmadas* v. *Amulyadhan*, I. L. R. 33 Calc. 1119, 3 C. L. J. 616. Upon the question of what amounts to acquiescence, see *Ananda* v. *Parbati*, 4 C. L. J. 198, where the leading English and Indian decisions on the subject are reviewed.

JOITARAM RAMKRISHNA

v.

RAMKRISHNA NANDLAL.*

[*Reported in I. L. R., 27 Bom., 31.*]

1902.

September, 12.

The judgment of their Lordships was delivered by

BATTY, J.—In this case the plaintiff seeks to recover possession of a certain portion of land which originally formed part of the joint ancestral property of his father (the defendant No. 1) and his father's brothers. In 1870 plaintiff's father and the brothers of plaintiff's father separated in interest, but the field of which the land in suit forms part was provisionally assigned for the maintenance of their mother, and therefore was not at the time partitioned Subsequently, after the death of the mother, the plaintiff's uncles executed, as to their unpartitioned share in that field, a document in favour of the plaintiff, then an infant, purporting to be a deed of gift. The document is Exhibit 17 It is dated 15th November, 1877, and was duly registered. According to its provisions the plaintiff's mother was to be the guardian of the plaintiff for the purposes of that property. It is not alleged that the plaintiff's uncles ever themselves enjoyed personally possession of the land in question, or delivered possession thereof to the plaintiff or to any one on his behalf. The plaintiff's father who was in possession remained in possession, paid the assessment and apparently had undisturbed management. In 1885 the plaintiff's father executed a mortgage, which included the property in suit. This mortgage was without possession.

On 1st January, 1887, the mortgage of 1885 was redeemed by moneys obtained from defendant No. 2, advanced on a mortgage with possession of the same land.

The plaintiff attained majority in 1892 and instituted the present suit on 2nd January, 1899, making his father a party thereto as well as defendant 2, the mortgagee before mentioned.

It appears that a third person not joined in this suit had bought the right, title and interest of the defendant No. 1 in the property in question at an auction sale, and the lower Courts held that this auction purchaser was a necessary party to the suit.

* *Present* :—Mr. Justice Batty and Mr. Justice Aston.

1902.

Joitaram Ramkrishna v. Ramkrishna Nandlal.

The main grounds of the defence were, however, that the gift was invalid both because it was unaccompanied with possession and because it purported to be the gift of an undivided share, and that more than twelve years of adverse possession barred the plaintiff's claim to disturb the mortgagee in which it was suggested he had acquiesced.

The leading cases on the question whether delivery of possession is necessary to the validity of a gift by a Hindu donor appear to be the Privy Council cases *Kalidas Mullick* v. *Kanhaya Lal Pundit* (1) followed in *Ugarchand* v. *Madapa* (2), and *Nawab Ibrahim Ali Khan* v. *Ummatul Zohra* (3). The first mentioned of these corrected the error in *Kachu Byaji* v. *Kachoba Vithoba* (4), that delivery of possession was indispensable to the validity of a sale under Hindu law. Their Lordships pointed out that the error appears to have arisen from a misconception as to what had been decided in *Harjiwan Anandram* v. *Naran Haribhai* (5), the real point in which was that the alleged donor had reserved his *jus disponendi*, had denied the fact of the gift and had continuously received the rent for the subject-matter. These last mentioned circumstances were emphasized as differentiating that case from one in which the donor had done all she could to complete the gift, was a party to the suit and admitted the gift to be complete (6). Their Lordships also pointed out, as contributing to the error, the misleading nature of the headnote in *Girdhar Parjaram* v. *Daji Dulabhram* (7) as to what was the essential ground of decision in that case. The judgment in *Kalidas Mullick* v. *Kanhaya Lal* (1) further distinguishes between cases of contracts on the face of them purporting to be for performance in future, as in the cases of *Rajah Saheb Perhlad Sein* v. *Babu Budhoo Singh* (8) *and Rani Bhobosoondri* v. *Issurchandra Dutt* (9) on the one hand, and cases where under the terms of a gift the donor is entitled to possession on the other, and with reference to the last mentioned cases observed that there is no reason why

(1) [1884] I. L. R., 11 Calc., 121 ; L. R., 11 I. A. 218.
(2) [1885] I. L. R., 9 Bom., 324.
(3) [1896] I. L. R., 19 All., 267 ; L. R., 24 I. A., 1.
(4) [1873] 10 Bom. H. C. R., 491.
(5) [1867] 4 Bom. H. C. R., 31.
(6) [1884] I. L. R., 11 Calc., at p. 132.
(7) [1870] 7 Bom. H. C. R., 4.
(8) [1869] 12 Moo. I. A., 275 at p. 306.
(9) [1872] 11 B. L. R., 36.

1902

Joitaram Ramkrishna v. Ramkrishna Nandlal.

a gift or contract of sale, if it is not of a nature which makes the giving effect to it contrary to public policy, should not operate to give the donee or purchaser a *right to obtain* possession.

The contention having been raised that the completion of a gift by possession was required on the analogy of the feudal rule as to investiture and livery of seizin, their Lordships preferred the analogy found in cases relating to voluntary contracts or transfers, where if the donor has done all that he could do to perfect his contemplated gift, he cannot be compelled to do more. With this may be compared the rulings in *Standing* v. *Bowring* (1) and cognate cases.

As to the contention that the deed of gift was utterly invalid because the donor was out of possession and no possession was ever given to the donee, it was observed "that the dispute was not between the donee and the donor, or a person claiming under her" thus the effect of the decision in *Kalidas Mullick's case* (2) is to recognize that, as between a donee and a stranger, a gift may be valid though at the time the donor may have been out of possession and though the donee may never have obtained possession, provided that the donor had done all the donor could to complete the gift.

The other Privy Council case of *Nawab Ibrahim* v. *Ummatul Zohra* (3) seems to establish the converse, *viz.*, that when the alleged donor has not done all he could to complete the gift, but has made a reservation of the *jus disponendi*, the alleged gift is unsustainable. The essential to the validity of a gift seems to be, therefore, that the donor should have done all he could to complete the gift.

It may be noted that the case of *Vasudeo Bhat* v. *Narayan Daji Damle* (4) was decided two years before that of *Kalidas Mullick* (2), and so far as it is inconsistent therewith, is overruled thereby.

The Case of *Ugarchand v. Madapa* (5) decided shortly after *Kalidas Mullick's case* (2), applied its principles to a *kararnama*, where the person who executed it was not in possession, and declared the Full Bench decision in *Bai Suraj* v. *Dalpatram Dayashanker* (6) overruled.

The Allahabad High Court, in *Man Bhari* v. *Naunidhi* (7)

(1) [1886] 31 Ch. D., 282.
(2) [1883] I. L. R., 11 Calc., 121 ; I. L. 11 I. A., 218.
(3) [1896] I. L. R., 19 All., 267.
(4) [1882] I. L. R., 7 Bom., 131.
(5) [1885] I. L. R., 9 Bom., 324.
(6) [1880] I. L. R., 6 Bom., 380.
(7) [1881] I. L. R., 4 All., 40.

followed in *Balmakund* v. *Bhagwandas* (1), seems to have held that the validity of the gift was dependent on, or at least established by, the delivery of the deed of gift. But the first of these was decided before *Kalidas Mullick's case* (2), and the second does not refer to it. In *Man Bhari* v. *Naunidhi*, the fact that the donor had relinquished the subject of the gift, so far as he could, was apparently regarded as the most important circumstances in the case. The case *Lakshimoni Dasi* v. *Nittyananda Day* (3) was one in which the alleged donor had executed a duly registered deed of gift, but four years after sold a portion for consideration and later another portion. The Calcutta High Court in that case, citing the decision in *Dharmodas Das* v. *Nistarni Dasi* (4) as correct in cases to which section 123 of the Transfer of Property Act applies, appears to have held that acceptance on the part of the donee was essential to the validity of a gift. The judgment in *Lakshimoni Dasi's case* (3) makes, however, but the most cursory reference to *Kalidas Mullick's case* (2) which it may be noted, nowhere refers to acceptance by the donee as essential. But as in *Lakshimoni Dasi's case* (3) the alleged donor had never given possession and the alleged donee had never made any objection to the subsequent vendor's possession, it is possible to regard that case as not inconsistent with the principle in *Nawab Ibrahim Ali Khan* v. *Ummatul Zohra* (5), and as regarding the alleged gift as incomplete, on the ground that though a document was executed, the alleged donor never intended to give effect to it and did not do all he might in order to give effect to it, and that the alleged donee having apparently acquiesced in his subsequent dealings with the property, it was fully understood that the mere execution of the document was not all that the donor would have done if he had wanted to perfect his gift. In *Meherali* v. *Tajudin* (6) the decision of the Privy Council in *Kalidas Mullick* v. *Kanhaya Lal* (2) was referred to, but deemed inapplicable to a case governed by Mahomedan Law and this Court's ruling in *Mohinuddin* v. *Manchershah* (7) was therefore followed, though in the same year the Privy Council case, *Mahomed Buksh Khan* v. *Hosseni Bibi* (8), applied the principle of *Kalidas Mullick's case* (2) to Mahomedan Law.

(1) [1894] I. L. R., 16 All, 185.
(2) [1884] I. L. R., 11 Calc., 121; L. R., 11 I. A., 218.
(3) [1892] I. L. R., 20 Calc., 469.
(4) [1887] I. L. R., 14 Calc., 446.
(5) [1896] I.L.R. 19 All., 267.
(6) [1888] I. L. R., 13 Bom., 156.
(7) [1882] I. L. R., 6 Bom., 650.
(8) [1888] L. R., 15 I. A., 81; I. L. R., 15 Calc., 684.

1902.

Joitaram Ramkrishna. v. Ramkrishna Nandlal.

The following cases may be noted as instances in which the ruling in *Kalidas Mullick* has been followed; *Lallubhai* v. *Keso* (1), *Shankar* v. *Visaji* (2); *Ramchandra* v. *Mhasu* (3); and in one of them, *Lallubhai* v *Keso* (1), registration was regarded as capable of supplying want of possession. In *Rajaram* v. *Ganesh* (4) it seems to have been regarded as a matter so far beyond dispute as to dispense with the need for citing authorities, that where a donor takes all the steps in his power to give effect to it, a gift is complete and he cannot revoke it. And in Mayne's Hindu Law, (6th Ed., p. 485, sec. 377) it is stated that when the resistance to the donor's attempts to give full effect to the donation arises from a third person, the fact that possession has not been given is no answer to a suit by the donee against the obstructing party. And though it is further stated by Mayne, (Hindu Law, p. 485, sec. 378) that there must be a transfer of the apparent evidences of ownership from the donor to the donee, it is also stated to be sufficient if the change of possession is such as the nature of the case admits of, and as instances are cited the delivery to the donee of the deed of gift, the possession of the donor in trust for a donee incapable of taking possession as being a minor, &c.

In the present case the donors never appear to have assumed actual personal possession after the death of their mother for whose benefit the land had been kept joint, and the lower appellate Court appears to have held that actual possession remained throughout with the father of the plaintiff. There was, therefore, no apparent reservation of any kind on the part of the donors. In relinquishing their own claims they did all that was practically necessary and by their registered deed of gift all that they could. It is objected that the mother of the donee was mentioned in that document as his guardian, but it is hardly to be conceived that the father of the donee could be regarded as setting up a possession adverse to his infant son or that the donors in assenting to his continuance in possession understood it to be adverse either to themselves or to the child. The possession of the father having manifestly originated in a mutual understanding, which recognized the title of the owners, could not without some overt act become adverse to them or to their disposing power; *Dadoba* v. *Krishna* (5); and the possession of the father was practically the only mode in

(1) [1886] P. J., p. 33.
(2) [1884] P. J., p. 35.
(3) [1888] P. J., p. 14.
(4) [1898] I. L. R., 23 Bom., 131.
(5) [1879] I. L. R. 7 Bom., 34.

which the infant son could accept or exercise possession. The donors never objected and made no attempt to revoke their gift. No division was necessary, as the entirety of the land in question was with the plaintiff's father.

It has been suggested by the lower appellate Court that the gift was invalid as being the gift of an undivided share, and *Vrandavandas Ramdas* v. *Yamunabai* (1) was cited as authority. But that was a case of alienation by a member of an undivided family to an outsider, whereas in the present case the gift is by persons who were not members of an undivided family (the uncles of the plaintiff having previously separated from his father) to the plaintiff, a member of another coparcenary. No consent was necessary to validate the alienation, nor was there any one who did or could object. The parties being Hindus, the question that arose in *Sheikh Muhummad Mumtaz Ahmad* v. *Zubaida Jan* (2) cannot arise here. On these grounds the gift appears unimpeachable.

Then it seems to have been held that the plaintiff is estopped from denying his father's title, because he allowed the mortgagee in 1887 to believe that his father was the sole owner and to advance money in that belief. Now, as the plaintiff admittedly only attained his majority in 1892, he was but a lad of thirteen in 1887 and cannot be reasonably regarded as having stood by and looked on in such manner as to estop him from questioning the transaction now. The property never passed from the possession of the father as on behalf of his son till the date of Exhibit 18,—1st January, 1887. And this suit, instituted on 3rd January, 1899, allowance being made for the Christmas holidays, was therefore within time. The suit therefore does not appear to be time-barred. It is true that it seems somewhat of a hardship that defendant having advanced money to the father should be deprived by the son on the point of acquiring a statutory title. But the son has not been shown to have been to blame and is not liable to lose his title for his father's acts. What other liabilities there may arise out of the transaction it is not necessary to discuss here. The plaintiff's pleader states that he has nothing to urge against an equitable order that the son should recover subject to payment of the proportionate amount of the loan by which he and his father have benefited.

As to the last point, *viz.*, that the auction purchaser was a necessary party, it seems sufficient to observe that the

(1) (1875) 12 Bom. H. C. R., 229.
(2) (1889) L. R. 16 I. A., 205.

1902.

Joitaram Ramkrishna v. Ramkrishna Nandlal.

plaintiff must be left to exercise his own discretion as to joinder of a defendant whose title is not necessarily involved in that of any other party to the suit. The plaintiff is *dominus litis*: *Rajaram Bhagwat* v. *Jibai* (1). If he chooses to leave the question that may arise between himself and the auction purchaser to future settlement, he does so at his own risk. He is not bound to sue every possible adverse claimant in this suit, if none of the parties claim through the auction purchaser, and for the purposes of this suit it is not necessary to establish title against him.

Much has been said as to the effect of Exhibits 51, 52 and 53 in this case, as judgments not *inter partes* and therefore inadmissible. This, under recent decisions, seems hardly to be a sustainable contention. But the judgments in question seem to add little to what appears from the record in this case, except that they contain a finding of fact that the mortgagee (defendant 2) in this case had actual notice of the deed of gift. It is unnecessary to have recourse to this, however, even for this purpose, for the defandant No. 2 does not appear to have raised the contention that he was a purchaser without notice, nor does it appear that such a contention, if defendant 2 had set it up, could have prevailed. The defendant 2 preferred to impugn the plaintiff's title on the ground of an alleged defect, which if established would at most have shown that the donors were entitled, and though it is contended that in such case their title would have been time-barred, it would have been difficult to conceive how the possession of defendant 1 could have been adverse to them at a date earlier than that at which it could have become adverse to the plaintiff. So far as they could they completed the gift, the terms of which they embodied in the registered deed, and they have never attempted any reservation or revocation in their own favour, and a stranger cannot challenge its validity as against the donee.

The decree of the lower appellate Court must be reversed; the appellant appears, however, to be entitled only to the share of his uncles in the entire field, and the decree must, therefore, be limited to one awarding him one-fourth share of the field to be ascertained in execution. Possession to be given to plaintiff on his paying into Court within six months from this date one-fourth of the amount due on Exhibit 18. The defendant 1 to bear his own costs and defendant 2 to pay plaintiff's costs and bear his own throughout.

Decree reversed.

(1) (1884) I. L. R., 9 Bom., 151, 155.

1902.

Joitaram Ramkrishna v. Ramkrishna Nandlal.

NOTE.—In this judgment, the Bombay High Court reviews the decision upon the much-debated question of what is essential to the validity of a gift under the Hindu Law, and, affirms the view that to validate the transaction it is enough that the donor should have done all he could to complete the gift. In this connection, reference should be made to the Privy Council decisions in *Sheikh Muhamed* v. *Zualifa Jan*, L. R. 16, I. A. 205, I. L. R. 11, All. 460, and *Nawab Ibrahim* v. *Umamtul Zohra*, L. R. 24 I. A. 1, I. L. R. 19 All. 267, in addition to the cases of *Kalidas* v. *Kashya*, and *Mahomed* v. *Hosseini* mentioned in the judgment. If acceptance is proved and the donor has done all that lies in his power to do to complete the gift, the gift would be valid as between the donee and a stranger, although the donor was not in possession and had not delivered possession to the donee (*Ram* v. *Ranjit*, I. L. R. 27 Calc., 242). It was upon this principle that in the leading case, a gift by two divided members of a Hindu family to the minor son of another member, effected by a registered instrument and apparently acquiesced in by the latter who was in possession of the whole property, was held valid as against a defendant who claimed under a mortgage subsequently effected by the father. Cf. Sec. 123 of the Transfer of Property Act, as to the effect of which, see *Dharmadas* v. *Nistarini*, I. L. R. 14 Calc. 446, *Rambai* v. *Mani*, I. L. R. 23 Bom. 234, and *Phulchand* v. *Lakkhu* I. L. R. 25 All. 358.

EDWARD TAILBY

v.

THE OFFICIAL RECEIVER.

[*Reported in L. R. 13 App. Cas*, 523.]

The following judgments were delivered :

1888.
July, 30.

LORD HERSCHELL.—My Lords, the short point to be determined in this case is whether an assignment by way of security of certain book debts not existing at the time of the assignment was valid, so as to give the assignee a good title to them when they came into existence.

By an indenture of the 13th of May, 1879, Henry George Izon assigned to John Tyrrell "all the book debts due and owing, or which might, during the continuance of the security, become due and owing to the said mortgagor." The debt now in question was incurred subsequently to the date of this indenture. It was not disputed by the respondent that it was a book debt which during the continuance of the security became due and owing to the mortgagor. On the 14th of November, 1884, the mortgagee's executors (under whom the appellant claims) gave notice to the debtors to pay the debt to them. The appellant having received the money, the respondent, who was the official receiver under the bankruptcy of Izon, sued in the Birmingham County Court to recover the money so received as part of Izon's estate. The County Court Judge gave judgment for the respondent and the Court of Appeal have held that he was right in so doing. They based their judgment on the ground that, as the assignment included all book debts which might thereafter become due to the assignor in any trade which he might thereafter carry on in any place, it was so vague that the Court ought to hold that nothing passed under it. The Master of the Rolls said : "That there is a doctrine that the description may be too vague is, to my mind, beyond question. Every one of the cases that has been decided has assumed that there is such a doctrine, and in each case the Court has tried to find whether the description in the particular case was or was not too vague ; but each and every of them recognises the doctrine." Now, if by "vague" be meant indefinite or uncertain, which is probably the ordinary meaning of the word, I do not think it is correct to say that the assignment in question is

1888.

Tailby v. Official Receiver.

in that sense vague. It appears to me to be perfectly definite. It was just as capable of proof that a book debt became due to H. G. Izon in some business carried on by him as that such a debt became due in the particular business mentioned in the deed. And I do not understand the learned Judges in the Court below to doubt that if the assignment had been limited to book debts becoming due in that business it would have been good and effectual even as regards future debts. Nay, it is quite conceivable that it might be more difficult to identify a debt as owing in respect of a specified business than as one due in a trader's business generally. Suppose a business to expand or to have new branches added to it, there might often be a difficulty in saying whether a debt was acquired in the specified business or not.

There is no doubt that an assignment may be so indefinite and uncertain in its terms that the Courts will not give effect to it because of the impossibility of ascertaining to what it is applicable. But that is certainly not the case with such an assignment as that which we are now considering.

If by "vague" be meant wide and covering a large area, that may certainly be said of the grant which has given rise to this controversy. And the Master of the Rolls is, I think, correct in saying that the Courts have in two cases, *viz.*, *Belding* v. *Read* (1) and *Re D'Epineuil* (2) acted upon the doctrine that an assignment of future-acquired property will be held invalid if in that sense it is too vague. The learned County Court Judge was bound by those decisions, but it is open to your Lordships to review them, and to consider whether they rest upon any sound basis. And, my Lords, I conceive that you have no alternative but to consider the question apart from authority, and to review the authorities, for to my mind it is impossible to reconcile the decision under appeal with that of the Court of Appeal in *Coombe* v. *Carter* (3), without resorting to distinctions which cannot be justified on principle. In that case the mortgage security covered "all moneys of or to which the mortgagor was, or might during the security become, entitled under any settlement, will, or other document, either in his own right or as the devisee, legatee, or next of kin of his father or any other person or persons." The mortgagor became entitled under a will to a share of the residuary estate. The Court of Appeal held that this share was covered by the mortgage. The decision in the

(1) 3 H. & C., 955. (2) 20 Ch. D., 758.
(3) 36 Ch. D., 348.

1888.

Tailby v. Official Receiver.

case now before your Lordships was much pressed upon them in argument. The Court, however, consisting of Cotton, Bowen, and Fry, L. JJ., refused to regard it as governing the case they had to decide. I can hardly say that they distinguished it except by saying that the terms of the two instruments and the subject-matter to which they related were not identical, and that as the former case laid down no principle it was inapplicable to that before them. I confess I am unable to see any sound distinction between an instrument assigning future book debts which may become due to the assignor in any business carried on by him and one assigning future bequests and devises to which he may under any will become entitled. The subjects of both assignments are equally wide, equally incapable of ascertainment at the time of the assignment, but equally capable of identification when the subject has come into existence and it is sought to enforce the security. I think the case of *Coombe* v. *Carter* (1) was correctly decided and that the views expressed by the learned Judges are equally applicable here. That case established no new principle; it proceeded on well settled lines. In the case of *Bennett* v. *Cooper* (2) where the security included all legacies which had already or might thereafter be given or bequeathed to the assignor or his wife by any person whomsoever, Lord Langdale held that legacies subsequently bequeathed to the mortgagor were bound. And few covenants are more common or have been more often given effect to than the covenant contained in marriage settlements to settle the wife's future-acquired property. It has never been doubted that these attach as soon as such property comes into existence.

The only authorities that can be cited as contrary to the view I am submitting to your Lordships, are those already referred to of *Belding* v. *Read* (3) and *Re D'Epineuil* (4). In the latter case Fry, L.J., avowedly followed *Belding* v. *Read* (3). Another point was, however, there adverted to. The charge under consideration in that case included all the present and future personalty of the person giving it. The learned Judge suggested that such a charge might be invalid as depriving the mortgagor of the power of maintaining himself. In *Coombe* v. *Carter* (1) the Court of Appeal left open the question whether such a disposition (which would of course be without effect at law so far as regarded future-acquired property) would be enforced in equity. I think your Lordships may also be content

(1) 36 Ch. D., 348.
(2) 9 Beav., 252.
(3) 3 H. & C., 955.
(4) 20 Ch. D., 758.

to put aside this point, which certainly does not arise in the case before you.

1888.
Tailby v. Official Receiver.

I cannot think that the decision in *Belding* v. *Read* (1) was correct so far as it turned on the same point as has now to be decided. The assignment to the extent to which it related to after-acquired chattels was undoubtedly void at law, and the question was whether it was effectual in equity to pass the property in question. It appears to me that the view taken by the learned Judges proceeded on a misapprehension of some observations of Lord Westbury in *Holroyd* v. *Marshall* (2). That learned Lord used the following language: "If a vendor or mortgagor agrees to sell or mortgage property real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee according to the terms of the contract." Now whatever the learned Lord meant by limiting the doctrine to the class of cases in which a Court of Equity would decree specific performance, he certainly did not intend to exclude cases in which after-acquired property fell within general descriptive words contained in the deed, for he enforced the security in that very case against such property. Nor, again, can I find any trace of the view that a Court of Equity would not enforce a contract relating to future acquired property if it was vague, in the sense of embracing much within its terms, for, as I have pointed out, Courts of Equity have frequently enforced such contracts. I think the language used referred only to that class of cases to which he had alluded in an earlier part of his opinion, where it could not be predicated of any specific goods that they fell within the general descriptive words of the grant.

In my opinion the judgment appealed from should be reversed, and the judgment of the Queen's Bench Division restored, and the respondent should pay the costs in the Court below and the costs of this appeal, and I move your Lordships accordingly.

(1) 3 H. & C., 955. (2) 10 H. L. C., 191.

LORD WATSON.—My Lords, the circumstances which have given rise to this litigation may be very shortly stated.

1888.
Tailby v. Official Receiver.

Henry George Izon, who at that time carried on the business of a packing-case manufacturer in Birmingham, by mortgage dated the 13th of May, 1879, assigned, for valuable consideration received, to the late John Tyrell, his stock-in-trade, and "all the book debts due and owing or which may, during this continuance of this security, become due and owing to the said mortgagor." In the months of October and November, 1884, Izon supplied a firm of Wilson Brothers & Co., upon credit, with goods to the value of £10 7s. 11d. The appellant, who had acquired Tyrell's interest in the debt, gave notice of the assignment to that firm, and required them to make payment of it to himself, which they accordingly did. Some time after the date of the notice Izon was adjudged bankrupt, and the respondent, who is trustee of his estate, now sues the appellant for repayment of the amount received by him from Wilson Brothers & Co.

It does not clearly appear whether the debt in question was incurred to the mortgagor in the business in which he was engaged in May, 1879, or in some other trade. In the argument addressed to your Lordships it was rightly assumed that the assignment comprehends every future book debt becoming due to Izon, in any profession or trade which may be followed by him in any place and at any time during the continuance of the security constituted by the mortgage. The respondent admitted that the liability of Wilson Brothers & Co., whenever it emerged, was, and until satisfied by payment continued to be a proper book debt, due and owing to the mortgagor. He maintained his right to it, in competition with the appellant, upon the single ground that the assignment of future book debts, in the mortgage of 1879, is ineffectual to carry any equitable interest to the assignee.

The Judge of the County Court of Warwickshire, before whom the suit was brought, gave judgment for the respondent. He held, in deference to the authority of *Belding* v. *Read* (1) and *In re Count D'Epineuil* (2), that an assignment of future book debts generally without any delimitation of time, place, or amount, is too vague to be supported. His decision was reversed by Hawkins, J., and Mathew, J., who were of opinion that the case fell within the principle to which this House gave effect in *Holroyd* v. *Marshall* (3); but it was restored by the Court of Appeal,

(1) 3 H. & C., 955. (2) 20 Ch. D., 758.
(3) 10 H. L. C., 191.

consisting of the Master of the Rolls and Lindley and Lopes, L. JJ.

Had there not been such a conflict of judicial opinion, I should have thought that the question thus raised for decision admitted of one answer only. The rule of equity which applies to the assignment of future choses in action is, as I understand it, a very simple one. Choses in action do not come within the scope of the Bills of Sale Acts, and though not yet existing, may nevertheless be the subject of present assignment. As soon as they come into existence, assignees who have given valuable consideration will, if the new chose in action is in the disposal of their assignor, take precisely the same right and interest as if it had actually belonged to him, or had been within his disposition and control at the time when the assignment was made. There is but one condition which must be fulfilled in order to make the assignee's right attach to a future chose in action, which is, that, on its coming into existence, it shall answer the description in the assignment, or, in other words, that it shall be capable of being identified as the thing, or as one of the very things assigned. When there is no uncertainty as to its identification, the beneficial interest will immediately vest in the assignee. Mere difficulty in ascertaining all the things which are included in a general assignment, whether *in esse or in posse*, will not affect the assignee's right to those things which are capable of ascertainment or are identified. Lord Eldon said in *Lewis* v. *Madocks* (1): "If the Courts find a solid subject of personal property they would attach it rather than render the contract nugatory."

In the case of book debts, as in the cases of choses in action generally, intimation of the assignee's right must be made to the debtor or obligee in order to make it complete. That is the only possession which he can attain, so long as the debt is unpaid, and is sufficient to take it out of the order and disposition of the assignor. In this case the appellant's right, if otherwise valid, was, in any question with the respondent, duly perfected by his notice to Wilson Brothers & Co. before Izon became a bankrupt. The learned Judges of the Appeal Court were unanimously of opinion that the description of book debts in the assignment of Tyrell is "too vague," and it is upon that ground only that they have held the assignment to be invalid. The term which they have selected, in order to express what they conceived to be the radical defect of the assignment, is susceptible of at least

(1) 8 Ves., 156.

1888.

Tailby v. Official Receiver.

two different meanings. It may either signify that the description is too wide and comprehensive, without implying that there will be any uncertainty as to the debts which it will include, if and when these come into existence, or it may signify that the language of the description is so obscure that it will be impossible, in the time to come, to determine with any degree of certainty to what particular debts it was intended to apply. In the latter sense the description of future book debts in the mortgage of 1879 does not incur the imputation of vagueness. No one has suggested that the expression "book debt" is indefinite; and it is, in my opinion, very clear that every debt becoming due and owing to the mortgagor, which belongs to the class of book debts (a fact quite capable of ascertainment), is at once identified with the subject-matter of the assignment.

The ground of decision in the Appeal Court was obviously this: that the description of future debts is "too vague," in the sense of being too wide and comprehensive, inasmuch as it embraces debts to become due to the mortgagee in any and every business which he may think fit to carry on. If it had been limited to debts arising in the course of the business of packing-case manufacturer, in which Izon was engaged at the date of the mortgage, the Master of the Rolls was, as then advised, prepared to hold that the description would not have been too vague. Upon that point the other members of the Court express no definite opinion, Lindley, L. J., merely remarking, "I do not say that an assignment of future book debts must necessarily be too vague." All of their Lordships were evidently under the impression that they were deciding the case according to a well established equitable doctrine, which Lopes, L. J., traces to *Belding* v. *Read* (1).

It is unnecessary for the purposes of this case to consider how far a general assignment of all after-acquired property can receive effect, because the assignment in question relates to one species of property only. I have been unable to discover any principle upon which the decision of the Court of Appeal can be supported, unless it is to be found in *Belding* v. *Read* (1). That case arose in a Court of Common Law, and, with all deference to the very learned Judges who decided it, I am bound to say that, in my opinion, they misapprehended the doctrine laid down by Lord Westbury in *Holroyd* v. *Marshall* (2), which was not new doctrine, but, as the noble Lord explicitly stated, was the mere enunciation

(1) 3 H. & C., 955. (2) 10 H. L. C., 191.

1888.

Tailby v. Official Receiver.

of elementary principles long settled in Courts of Equity. It is possible that the learned Judges were misled by the reference which the noble Lord makes to specific performance, an illustration not selected with his usual felicity. Not a single decision by an Equity Court was cited to us, prior in date to *Belding* v. *Read* (1), which gives the least support to the opinions expressed in that case, and I venture to doubt whether any such decision exists. It is true that Judges on the equity side of the Court have, in one or two instances, deferred to the views expressed in *Belding* v. *Read* (1) which they assumed to be an authoritative exposition of the law applied by this House in *Holroyd* v. *Marshall* (2); but these views conflict with the previous cases in equity, to which Lord Westbury referred as establishing a well-known and elementary principle. In *Bennett* v. *Cooper* (3), Lord Langdale, M. R., gave effect to an equitable mortgage by a debtor of "all sums of money then or thereafter to become due to him, and all legacies or bequests which had already or might thereafter be given or bequeathed to him or his wife, by any person whomsoever." I cannot understand upon what principle an assignment of all legacies which may be bequeathed by any person to the assignor is to stand good, and effect is to be denied to a general assignment of all future book debts. As Cotton, L. J., said, in *In re Clarke* (4): "Vagueness comes to nothing if the property is definite at the time when the Court is asked to enforce the contract." A future book debt is quite as capable of being identified as a legacy; and in this case the identity of the debt, with the subjects assigned, is not matter of dispute. When the consideration has been given, and the debt has been clearly identified as one of those in respect of which it was given, a Court of Equity will enforce the covenant of the parties, and will not permit the assignor, or those in his right, to defeat the assignment upon the plea that it is too comprehensive.

I am accordingly of opinion that the order appealed from ought to be reversed, and the judgment of the Divisional Court restored.

Lord Fitz Gerald.—My Lords, I feel great difficulty as to the reasons which I am about to give. Before your Lordships proceed to decide finally the abstract question which it is said that this appeal raises, it seems to me to be necessary to review and get before the House accurately the facts of the case.

(1) 3 H. & C., 955.
(2) 10 H. L. C., 191.
(3) 9 Beav., 252.
(4) 36, Ch. D., 353.

1888.

Tailby v. Official Receiver.

[His Lordship having minutely considered the whole evidence in the cause from which he deduced the conclusion that the whole liability of the mortgagor under the mortgages of 1879 and 1880 had been respectively discharged, and that the two deeds had become satisfied securities before any assignment to Tailby of the book debts, and consequently could afford no answer to the claim of the receiver, then proceeded as follows:—]

It might, however, be unfit to act here on suggestions of fact, though arising on the documentary evidence alone, which do not appear to have been made in any of the Courts below and which certainly were not brought under the notice of the acute and able Judge of the Court of first instance. The case was put forward as a test case, and supposed to raise for decision the one large question on which the noble and learned Lords have just stated their conclusion.

There is, however, a view of the transactions which must be disposed of. Let us assume that the instrument of 1879 was an existing security, unsatisfied and in full force at the time of the assignment of the book debts to Tailby, and that all the steps taken by the mortgagee had been regular and effectual. The deed of 1879 had not, as to the future debts, any greater operation than as an agreement for value to assign those future debts when they came into existence. I do not now pause to consider whether equity would, from time to time, as debts became due, decree specific performance of that agreement. It was at least a contract which as between the immediate parties to it had certain efficacy, and was not wholly inoperative. If, for instance, as to future-acquired chattels coming within its provisions the mortgagee had managed peaceably to gain actual possession of them, he could retain that possession as against the mortgagor; and so if, claiming to be entitled under his deed, to receive a future accruing debt, he had demanded and received payment of it from the debtor, the mortgagor could not recover from the mortgagee the sum he had so received. Let us see how this case stands in this respect. The deed of 1879 contains an assignment of future debts and also that comprehensive appointment by the mortgagor of the mortgagee as his attorney, to execute for him and in his name assignments of these future rights, when and as they should arise either to himself or to any other person, and also a power to receive those debts when and as they became payable and give full and effectual discharges for them, a power in fact to do for himself and in virtue of that authority all that a Court of Equity could do for him if there

had been no difficulties in the way of obtaining relief from that tribunal. There is nothing in law to prohibit the mortgagor from conferring such an authority on the mortgagee, or to prevent parties from helping themselves if they can lawfully do so.

1888.
Tailby v. Official Receiver.

The whole of the steps taken in November were lawful and unobjectionable and the parties were competent to take them. The deed of 1879 professed to pledge these future debts to the mortgagee and conferred on him large and exceptional powers to enforce that pledge. His representatives availed themselves of their powers and position to enforce their rights, and did all that they could lawfully do as equivalent to taking possession, and determining reputed ownership: see *In re Hennessy* (1). The mortgagor certainly did not oppose, and the proper inference is that he acquiesced. If Tailby had received the amount of Wilson's debt before the adjudication in January, 1885, his title to retain it against the receiver would not be open to any question. Does the adjudication before actual payment and the intervention of the receiver make any difference? The latter does not appear to have intervened until the following month of May; the payment was actually made by Wilson in January previous. The assignee, trustee, and receiver in bankruptcy derive their title to the estate through the bankrupt and subject to the rights and equities which would affect it in the hands of the bankrupt, save where by statute for the protection of creditors overreaching rights are conferred upon them. There is no allegation that the adjudication here had any retrospective operation, nor is it alleged that the transactions with Tailby were tainted with any fraud, nor can I discover any satisfactory ground on which the receiver can override the proceedings of November which were binding on the bankrupt, and recover the money actually paid over in January.

It seems to me therefore, though I express the view with hesitation, that the action of the receiver in the County Court fails, that he is not entitled to recover the money received by Tailby from Wilson, and that the defendant Tailby is entitled to judgment. If, my Lords, I am correct in this view, no further question arises—the decision of the Court of Appeal and of the County Court Judge should be reversed, and the judgment of the Divisional Court should be restored.

My Lords, in the course of the argument at the bar some of these considerations were thrown out for discussion, but it was said in

(1) 2 Dr. War., 555.

1888.

Tailby v. Official Receiver.

reply that this was "a test case" to elicit your Lordships' decision on an abstract question of great public importance.

The Master of the Rolls is represented to have put the question thus: "It seems to me that according to the ordinary rules of construction, the deed of 1879 applies to the book debts which may become due to Izon in any trade which he may hereafter carry on anywhere, that is, any trade which it may please him during the continuance of the security, or which it may be for his benefit to carry on in any part of England, any part of Wales, any part of Scotland, or in any part of France, Germany, Ireland, or America. That is the true reading, and is that, or is it not, within the doctrine that the description of these book debts is so vague that the Court will hold that nothing passed under it?" It is not quite certain that this is critically correct, and the question would seem rather to be whether the description of the future debts professed to be assigned by the deed of 1879 was so vague and so uncertain that the mortgagee could not so far actively enforce it in any Court of Justice. I decline to decide test questions, merely because the case is called "a test case." What is a test case? Probably it is meant to represent a case in which some question of law necessarily arises, governing some other like cases, and to which your Lordships are required to apply the crucial test of the judgment of the House.

My Lords, when such a case comes before the House, your Lordships must and do decide it, but it is not the province of the House to decide abstract questions which are not actually necessary, as the foundation of the judgment of the House. The question has not, up to the present moment, been finally decided. It is one of no inconsiderable difficulty and involves considerations of public policy. What construction is to be put on "future book debts"? Does it mean the trade debts entered in the trader's books, or does it mean the nett residue of those debts after satisfying the claims of those creditors by means of whose property those debts came into existence? Would an account have to be taken as in the case of the trading of a bankrupt after bankruptcy, and without certificate, and debts becoming due to him in that second trading, and claimed by the assignee as after-acquired property? See *Troughton* v. *Gitley* (1). The reports of Amblar were not unfrequently questioned, but the decree, taken from the Registrar's book, is given in the note to *Tucker* v. *Hernaman* (2) and the decision in *Troughton* v. *Gitley* (1) was adopted by Turner, L. J.

(1) Amb., 630. (2) 4 D. M. & G., 396.

1888.

Tailby v. Official Receiver.

Suppose, too, in the case of future debts that the mortgagor had obtained bills and notes or other securities from his debtors, how are the rights and liabilities of the parties to be adjusted? Or suppose a trader to become bankrupt, his assets consisting largely of recent book debts, representing his stock in trade, out of which they were created; are those book debts to go to the holder of a bill of sale, probably some years old, not registered, and of which the real creditors had no notice?

I allude only to these possible contingencies as illustrating some of the difficulties that beset the question, and indicating the inexpediency of carrying the law a step further than it has hitherto gone in practice.

My Lords, in a case recently before the House, your Lordships considered that the policy of the Bills of Sale Act of 1882 was to prohibit, in cases coming within its provisions, bills of sale of property not in existence but which might be acquired thereafter. (1) Your Lordships are now asked to give effect to an instrument which, though a bill of sale of future debts of the most unlimited and undefined character, does not as to book debts come within the Bills of Sale Code.

My Lords, I have listened to the weighty reasons given by my noble and learned friends, and I have read the judgment to be delivered by my noble and learned friend who is to follow me. That judgment is one of great learning and ability and remarkable for its boldness. I have weighed all the reasons so powerfully given, and hope your Lordships will excuse me if, for the present, I hesitate and, for the reasons I have given, decline to express either assent to or dissent from the conclusions of my noble and learned friends.

The course which I have deemed it expedient to adopt renders it unnecessary for me to consider the authorities.

Lord Macnaghten.—My Lords, I venture to think that this case is free from difficulty when the facts are understood.

Izon was a packing-case manufacturer. In 1879 he compounded with his creditors. At Izon's request, Tyrrell signed promissory notes for the last instalment of the composition, taking from Izon a bill of sale as a counter security.

The bill of sale is dated the 13th of May, 1879. It assigns to Tyrrell by way of mortgage, among other property, all the stock-in-trade and effects which during the continuance of the security might be

(1) *Thomas* v. *Kelly*, L. R., 13 App. Cas., 506.

1888.

Tailby v. Official Receiver.

on the mortgagor's then premises, or at any other place at which during the continuance of the security he might carry on business, and also (to quote the words of the deed) "all the book debts due and owing, or which may, during the continuance of this security become due and owing to the said mortgagor." Then there is a power of attorney in the most ample terms; a proviso that if the mortgagor on demand fails to pay the amount due, the mortgagee may take possession and sell the property in mortgage; and a proviso that until default the mortgagor may use and enjoy all the mortgaged premises; and lastly, there is a covenant for further assurance. Another bill of sale was given in 1880, but I need not refer to it; it was admitted at the bar that it had no bearing on the question before your Lordships.

I pause for a moment to point out the nature and effect of the security created by the bill of sale of 1879. It belongs to a class of securities of which perhaps the most familiar example is to be found in the debentures of trading companies. It is a floating security reaching over all the trade assets of the mortgagor for the time being, and intended to fasten upon and bind the assets in existence at the time when the mortgagee intervenes. In other words, the mortgagor makes himself trustee of his business for the purpose of the security. But the trust is to remain dormant until the mortgagee calls it into operation.

The business in the immediate contemplation of the parties was, of course, the business in existence at the date when the bill of sale was given. But the assignment is not limited to that; it extends to any business which the mortgagor may carry on during the continuance of the security. That was an obvious, and, if not forbidden by law, a proper precaution. A tradesman who has been unfortunate in his business is perhaps as likely to try a change as one who has been uniformly successful. The draftsman I think would have shewn more simplicity than skill if he had left it in the power of the mortgagor to imperil or defeat the security by altering his business, or by transferring his capital to some other enterprise.

In reliance on the arrangement I have described, Tyrrell paid a large sum to Izon's creditors. But he seems to have been content with his security; and Izon continued to trade without any interference on his part, and apparently without any alteration in the character of the business. In 1885 the executors of Tyrrell, who was then dead, thought fit to call in the money due to his estate. They demanded payment. They took possession of the mortgaged

premises, so far as it was practicable to do so, and they sold the book debts. 1888.

Tailby v. Official Receiver.

Among the book debts which were sold was one of which had recently become due from Messrs. Wilson Brothers & Co. The purchaser at once gave notice to them. The next thing that happened was that Izon became bankrupt. After that Messrs. Wilson Brothers & Co. paid the purchaser.

The Court of Appeal has held unanimously that the official receiver is entittled to recover the money from the purchaser. Your Lordships have now to determine whether that decision is right.

The question is not complicated by any circumstances other than those I have mentioned. The transaction between Izon and Tyrrell is not impeached as fraudulent under the Act of Elizabeth, or on any other ground. Nor is it necessary to consider the provisions of the Bills of Sale Acts. Choses in action are expressly declared not to be personal chattels within the meaning of those Acts.

The grounds on which my noble and learned friend opposite has founded his opinion were not discussed at the bar, nor is there, I think, sufficient evidence before your Lordships to enable your Lordships to act on them.

The claim of the purchaser was rested on well-known principles. It has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified.

The position of the purchaser was assailed on one point, and one point only. It was not disputed that Tyrrell gave valuable consideration for the bill of sale, or that Tyrrell's executors were within their rights in selling whatever was comprised in the security. It was not denied that the debt purchased was a book debt which became due and owing to Izon during the continuance of the security, nor was any question raised as to the sufficiency of the notice which the purchaser gave to Messrs. Wilson Brothers & Co. The contention of the learned counsel for the respondent was this: They asserted as a proposition of law that an assignment of future book debts not limited to any specified business is too vague to have any effect. Starting from that proposition they asked your Lordships to

1888.

Tailby v. Official Receiver.

come to the conclusion that the assignment of book debts in the present case was void from the beginning as including in its terms book debts which could not be made the subject of valid assignment. I do not stop to consider whether that is a necessary or legitimate conclusion. It is a startling result certainly, and I shall have a word to say about it by and by. At present I am merely inquring whether the original proposition is sound. In the leading judgment in the Court of Appeal it is said that the doctrine which covers the proposition is well established, because "in every one of the cases in point that were cited in existence has been assumed." The principle of the doctrine, however, is not stated; the doctrine itself is not defined; the cases which are supposed to be in point are not reviewed or even named. But the high authority of the learned judges who have adopted this view makes it necessary to examine the matter closely. The learned counsel for the respondent gave your Lordships every assistance that ingenuity and industry could supply; and the result of their labours may fairly be summed up as follows: The origin of the doctrine, modern though it be, is lost in obscurity. Before *Holroyd* v. *Marshall* (1) no support for it can be found. Possibly it may be evolved from *Holroyd* v. *Marshall* (1). Lopes, L.J., seems to think so. It assumed a definite form in *Belding* v. *Read* (2). It was recognised by Fry, J., in *In re Count D'Epeneuil* (3), and it received the stamp of authority from what was said or implied by two of the learned Judges who decided *Clements* v. *Matthews* (4). No other authority or semblance of authority was produced. My Lords, I have read *Holroyd* v. *Marshall* (1) many times, and I can discover no trace of the doctrine there. *Belding* v. *Read* (2), as Bowen, L. J., points out, was founded upon a misapprehension of Lord Westbury's judgment in *Holroyd* v. *Marshall* (1). In *In re count D'Epeneuil* (3), the learned Judge, as he stated in *In re Clarke* (5) thought himself bound by *Belding* v. *Read* (2), and simply followed the decision in that case. As for the order made in *In re Count D'Epeneuil* (3) it seems to me to have been only too favourable to the claimant. I much doubt whether a memorandum like that on which the claimant relied could create a specific lien of any sort or kind. Finally, Cotton, L. J., has himself disclaimed the hidden meaning attributed to his judgment in *Clements* v. *Matthews* (4).

So much for authority. What foundation is there for the doc-

(1) 10 H. L. C., 191.
(2) 3 H. & C., 955.
(3) 20 Ch. D., 758.
(4) 11 Q. B. D., 808.
(5) 36 Ch. D., 348.

trine apart from authority? The learned counsel for the respondent did not pretend to be wiser than the Court of Appeal. They, too, neither defined the doctrine the aid of which they invoked, nor stated any principle on which it could be supposed to rest. They contented themselves with endeavouring to maintain the proposition that an assignment by a trader of future book debts not confined to a specified business is too vague to be effectual. Why should this be so? If future book debts be assigned, the subject-matter of assignment is capable of being identified as and when the book debts come into existence, whether the description be restricted to a particular business or not. Indeed the restriction may render the task of identification all the more difficult. An energetic tradesman naturally developes and extends his business. One business runs into another, and the line of demarcation is often indistinct and undefined. The linen draper of to-day in the course of a few years may come to be the proprietor of an establishment providing everything that man wants, or woman either, from the cradle to the grave. In such a case I can easily concieve that difficult questions might arise if the book debts assigned were limited to a particular business.

It was admitted by the learned counsel for the respondent, that a trader may assign his future book debts in a specified business. Why should the line be drawn there? Between men of full age and competent understanding ought there to be any limit to the freedom of contract but that imposed by positive law or dictated by considerations of morality or public policy? The limit proposed is purely arbitrary, and I think meaningless and unreasonable. The rule laid down by the Court of Appeal would not help to identify or ascertain the subject-matter of the contract in any case. It might have the opposite effect. It would be no benefit to the assignor's general creditors. It might prevent a man from raising money on the credit of his expectations in his existing business—on that which is admitted to be capable of assignment—in consequence of the obvious risk that some alteration in the character of the business might impair or defeat the security.

Under these circumstances I think your Lordships will come to the conclusion that the proposition on which the respondent relies as the foundation of his case cannot be supported on principle, and that the authorities on which it was supposed to rest may be traced to a decision of the Court of Exchequer which itself is founded on an erroneous view of the principles recognised in this House in *Holroyd* v. *Marshall* (1).

(1) 10 H. L. C., 191.

1888.

Tailby v. Official Receiver.

My Lords, I should wish to say a few words about *Holroyd* v. *Marshall* (1), because I am inclined to think that *Belding* v. *Read* (2) is not the only case in which Lord Westbury's observations have been misunderstood. To understand Lord Westbury's judgment aright, I think it is necessary to bear in mind the state of the law at the time, and the point to which his Lordship was addressing himself. *Holroyd* v. *Marshall* (1) laid down no new law, nor did it extend the principles of equity in the slightest degree. Long before *Holroyd* v. *Marshall* (1) was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done, and in accordance with the maxim which Lord Thurlow said he took to be universal, "that whenever persons agree concerning any particular subject, that, in a Court of Equity, as against the party himself and any claiming under him, voluntarily or with notice, raises a trust" : *Legard* v. *Hodges* (3). It had also been determined by the highest tribunals in the country, short of this House—by Lord Lyndhurst as Lord Chancellor in England, and by Sir Edward Sugden as Lord Chancellor in Ireland—that an agreement binding property for valuable consideration had precedence over the claim of a judgment creditor. Some confusion, however, had recently been introduced by a decision of a most eminent judge, who was naturally less familiar with the doctrines of equity than with the principles of common law. In that state of things, in *Holroyd* v. *Marshall* (1), in a contest between an equitable assignee and an execution creditor, Stuart, V. C., decided in favour of the equitable assignee. His decision was reversed by Lord Campbell, L. C., in a judgment which seemed to strike at the root of all equitable titles. Lord Campbell did not hold that the equitable assignee obtained no interest in the property the subject of the contract when it came into existence. He held that the equitable assignee did obtain an interest in equity. But at the same time he held that the interest was of such a fugitive character, so shadowy, and so precarious, that it could not stand against the legal title of the execution creditor, without the help of some new act to give it substance and strength. It was to this view, I think, that Lord Westbury addressed himself ; and

(1) 10 H. L. C., 191. (2) 3 H. & C., 955.

(3) 1 Ves. Junr., 478.

1888.

Tailby v. Official Receiver.

by way of shewing how real and substantial were equitable interest springing from agreements based on valuable consideration, he referred to the doctrines of specific performance, illustrating his argument by examples. One of the examples, perhaps, requires some qualification. That, however, does not affect the argument. The argument is clear and convincing; but it must not be wrested from its purpose. It is difficult to suppose that Lord Westbury intended to lay down as a rule to guide or perplex the Court, that considerations applicable to cases of specific performance, properly so-called, where the contract is executory, are to be applied to every case of equitable assignment dealing with future property. Lord Selborne has, I think, done good service in pointing out that confusion is sometimes, caused by transferring such considerations to questions which arise as to the propriety of the Court requiring something or other to be done *in specie* [*Wolverhampton and Walsall Railway Company* v. *London and North Western Railway Company* (1).] His Lordship observes that there is some fallacy and ambiguity in the way in which in cases of that kind those words "specific performance," are very frequently used. Greater confusion still, I think, would be caused by transferring considerations applicable to suits for specific performance—involving, as they do, some of the nicest distinctions and most difficult questions that come before the Court—to cases of equitable assignment or specific lien where nothing remains to be done in order to define the rights of the parties, but the Court is merely asked to protect rights completely defined as between the parties to the contract, or to give effect to such rights either by granting an injunction or by appointing a receiver, or by adjudicating on questions between rival claimants.

The truth is that cases of equitable assignment or specific lien, where the consideration has passed, depend on the real meaning of the agreement between the parties. The difficulty, generally speaking, is to ascertain the true scope and effect of the agreement. When that is ascertained you have only to apply the principle that equity considers that done which ought to be done if that principle is applicable under the circumstances of the case. The doctrines relating to specific performance do not, I think, afford a test or a measure of the rights created. There are cases where the rights of the parties may be worked out by means of specific performance, though no specific lien is effected by the agreement itself. More

(1) L. R., 16. Eq., 433.

1888.

Tailby v. Official Receiver.

frequently a specific lien is effected though no case of specific performance is contemplated. Take the case of *Mornington* v. *Keane* (1). There Lord Mornington covenanted that he would, on or before a specified day, either by a charge on freehold estates in England or Wales or by an investment in the Funds, or by the best means which might be then in his power, secure the payment of an annuity to a trustee for his wife. The Lord Chancellor did not doubt that the covenant would entitle the covenantee to have it performed *in specie*, but still it was held by the Court that the covenant of itself created no lien on the covenantor's property. Take the present case. The rights of the parties are completely defined by the bill of sale. Though there is the usual covenant for further assurance, it is plain that no further deed was contemplated. Yet no one can doubt that if Izon had attempted to receive outstanding book debts after the mortgagee had intervened, the Court would at once have lent its assistance by the appointment of a receiver. The case of *Metcalfe* v. *Archbishop of York* (2) is, I think, a good illustration of the argument I am presenting to your Lordships. In 1811 an incumbent charged his benefice with an annuity, and covenanted that if he should be prepared to any other benefice he would charge it with the annuity, and that in the meantime it should stand charged therewith, and there was a covenant for further assurance. At the date of the deed the charge was not illegal, for the statute of Elizabeth had been repealed in 1803. In 1814 the incumbent was preferred to another living. In 1817 charges on ecclesiastical benefices were again prohibited by the Act 57 Geo. 3, C. 99. No legal charge upon the new living had been executed before that Act passed. A question afterwards arose between the person entitled to the annuity and judgment creditors in possession under a sequestration. It was argued by Mr. Jacob for the judgment creditors that as specific performance would be in contravention of the statute the equitable title must fail. It was contended that the covenant was all one, and that it amounted only to a covenant for a legal charge which was prohibited by law before any attempt was made to enforce it. But the Lord Chancellor was of opinion that that was not the true construction of the deed, and that there was an equitable charge independently of the covenant to execute a legal charge. It was then said for the defendants that all equitable charges rest upon specific performance and the right to have a legal charge. Lord Cottenham, however, replied, "This is by no means

(1) 2 D. & J., 292. (2) 1 My. & Cr., 547.

so," and he affirmed the Vice-Chancellor's judgment giving effect to the equitable charge. There the contract for a legal charge would have raised a case of specific performance. But specific performance of that contract was out of the question. The contract for an equitable charge raised no question of specific performance. A contract for value for an equitable charge is as good an equitable charge as can be. It could not be made any better, though the aid of the Court might be required to protect or to give effect to it. Mr. Jacob's argument (to cite the words of the report, p. 549) was this: "The whole doctrine of equitable charges rests on the right to specific performance, for a person having an equitable charge has no estate or interest." Lord Cottenham, summarily, rejected the proposition. Lord Westbury demolished the foundation on which it was put. And, oddly enough, the proposition is now supposed to be established by Lord Westbury's authority.

It may be said that this a question of words. To a great extent it is so; most questions are. But I venture to think that the discussion is not out of place, because I observe that Lindley, L. J., from whom I differ on a point of equity with much reluctance, was led to disregard the rights of the purchaser in the present case in consequence of the difficulties presented to his mind by the application of the doctrines of specific performance.

In the course of the argument your Lordships were referred to a recent case *In re Clarke, Combe* v. *Carter* (1). In principle I am unable to distinguish that case from the present, though others have been more fortunate. *In re Clarke* (1) was the case of a mortgage. So is this. The contest there, as it is here, was with the mortgagor's general creditors. The assignment which gave rise to the question in that case was an assignment of any moneys to which the mortgagor might be entitled under any will. A charge on book debts in a business not yet established, and perhaps not even thought of, is at best a doubtful security. Most people would think it speculative. Some might call it visionary. But the same terms might be applied without any great impropriety to a charge on a possible legacy from an unknown friend or secret admirer. As to vagueness, whatever that expression may mean, I cannot see that the one can be more vague than the other. In *In re Clarke* (1) the charge was enforced against a legacy which happened to come to the mortgagor some years after the mortgage was made. The judgment

(1) 35 Ch. D., 109; 36 Ch. D., 348.

1888.

Tailby v. Official Receiver.

of Kay, J., was read to your Lordships. And a very able and exhaustive judgment it is. No one is more familiar with the doctrines of equity than that learned Judge. But I gather from his remarks that if he had not been pressed with the decision now under appeal he would have treated the case as a matter of course not open to argument.

My Lords, I need hardly say that I think the decision in *In re Clarke* (1) unquestionably correct, and I should add nothing more about it but that I find that some of the learned Judges have drawn a distinction which I confess I am unable to appreciate. It was said that both in *Clements* v. *Matthews* (2) and in *In re Clarke* (1) the contract was divisible, but that in the present case the contract is indivisible. My Lords, I am not sure that I quite understand what is meant by saying that the contract is divisible in cases of this description. The contract is not, I think, divisible in the usual acceptation of the word. The consideration is not intended to be apportioned, nor can that for which the consideration is given be said to be divisible except in the sense that it consists of a collection of things capable of separation or division without destruction. To say that an assignment by a trader of all future book debts in his present business and also of all future book debts in any other business which he may hereafter undertake, is divisible, but that an assignment of all his future book debts is not divisible, seems to me to be attributing substance and reality to the merest verbal distinction. In the present case Lopes, L. J., says "here the words are not capable of being read distributively." The rest of the Court take the same view. And in *In re Clarke* (1) Cotton and Fry, L. JJ., both seem to think the point material. Can it really make any difference that the several things for which the mortgagee has bargained, and on the faith of which he has advanced his money, are lumped together in one single expression, if, in fact, they have a separate existence, or are capable of being dealt with separately? Brevity has its dangers or its advantages, if equity will absolve a man from his bargain merely because he has packed into a sentence or compressed into a word a description of particulars which might have been set forth at large and expanded under several heads or sub-divisions. This is a question, remember, between the original parties to the bargain. The contract cannot be avoided for the benefit of the mortgagor's creditors unless it is held not binding as between the mortgagor and the mortgagee.

(1) 35 Ch. D., 109; 36 Ch. D., 348. (2) 11 Q. B. D., 808.

1888.

Tailby v. Official Receiver.

Even in an executory contract I apprehend it is not competent for the vendor to say "I cannot give you all I promised and so you shall have nothing." The purchaser is entitled to take what the vendor can give him, and as a general rule he is also entitled to a corresponding abatement in the price. But when the consideration has actually passed, it is difficult to suppose anything less consonant with equity than a rule which should lay down that a man who has had the benefit of the contract may escape from its burthen merely because he has promised what he can perform and something more too, and promised it all in one breath, and in the most compendious language. Surely the other party to the contract ought to have a voice in the matter. He may, perhaps, think half a loaf better than no bread, especially when he has paid for the whole and the seller is not in a position to return any part of the price.

My Lords, when I find such a concurrence of opinion in favour of a view which seems to me to be contrary to equity, I may perhaps be forgiven for referring to one authority, a very old one, but none the worse, I think, for that. *Bettesworth* v. *Dean and Chapter of St. Paul's* (1), was divided in this House in 1728. The facts are rather complicated, but the point may be stated shortly. Before the disabling statute of Elizabeth the dean and chapter granted a lease for a long term with a covenant for renewal for ninty-nine years. In 1725 a bill was brought to enforce the covenant, or to compel the dean and chapter, who had had the benefit of the agreement, to grant a renewal for such a term as might by law be granted. The case was twice argued in Chancery. On the second occasion the Lord Chancellor was assisted by Raymond, L. C. J., Jekyll, M.R., and Price, J. The Court (the Master of the Rolls dissenting) declared that the plaintiffs were not entitled to any relief either in law or equity, and so the bill was dismissed. On appeal, the objections which had prevailed in the Court below were repeated. It was argued that the grant of a lease for ninety-nine years was prohibited by the statute, and that the covenant was one entire covenant, which could not be varied or divided. "In answer to these objections," to quote the words of the report, which gives the arguments of counsel at length, but not the reasons for the judgment, "it was said to be a harsh way of reasoning, that because a person was now supposed to be prohibited from doing the whole of what he had agreed to do, he

(1) 1 Bro. P. C., 240.

1888.

Tailby v. Official Receiver.

therefore should not do what was in his power and was lawful for him to perform, or to say that because part of a thing was taken away the whole must be so too, though part was still reserved; and in truth such construction and reasoning were apprehended to be inconsistent with the rules of equity." All the judges having been consulted, the House took that view, and it was ordered and adjudged that the decree should be reversed, and that the dean and chapter should make a new lease for forty years.

In the result, therefore, and for the reasons I have given, I am of opinion that the case of the respondent entirely fails. The original proposition is not, I think, well founded. If it were sound the conclusion attempted to be drawn from it could not, as it seems to me, be maintained.

I have, therefore, no hesitation in concurring in the motion which has been proposed.

LORD WATSON.—My Lords, with reference to what fell from my noble and learned friend opposite (Lord FitzGerald), I desire to explain that I do not understand the present to be a test case in any other sense than this, that a question of some general importance is fairly raised by the actual facts, as these have been stated by the parties, in both Courts below as well as in this House. I purposely abstain from expressing any opinion upon the matters of fact discussed in the judgment of my noble and learned friend, because I am not satisfied that we have before us sufficient materials for their decision, and they were not referred to in the arguments of counsel.

LORD HERSCHELL.—My Lords, I desire to express my concurrence with what my noble and learned friend on my left (Lord Watson) has said. I certainly did not understand this appeal to be a test case upon a question not raised by the facts. I did not enter into the discussion of the points raised by my noble and learned friend on my right (Lord FitzGerald) because they were not adverted to in the Courts below, nor was any reliance placed upon them by any of counsel at your Lordships' bar.

Order appealed from reversed; order of the Queen's Bench Division restored; the respondent to pay to the appellant his costs in the Court of Appeal and the costs of the appeal in this House; cause remitted to the Queen's Bench Division.

1888.

Tailby v. Official Receiver.

NOTE :—In this case the House of Lords ruled that where a Bill of Sale assigned all the book debts due and owing or which might, during the continuance of the security, become due and owing to the mortgagor, this assignment of future book debts, though not limited to book debts in any particular business, was sufficiently defined, and passed the equitable interest in book debts incurred after the assignment, whether in the business carried on by the mortgagor at the time of the assignment or in any other business. The principle that a mortgage of property which is to come in existence in the future, is a valid transaction enforceable by Court of Equity, had been affirmed by the House of Lords in *Holroyd* v. *Marshall*, 10 H. L. C. 191, and has been applied to this country in the case of a mortgage of an indigo factory together with the indigo-cakes which might be manufactured there (*Baldeo* v. *Müller*, I. L. R. 31, Calc. 667). Reference may also be made to *Gayadin* v. *Kashigir*, I. L. R. 29 All. 163, and *Khobhari* v. *Ramproshad*, 7. C. L. J. 387, for applications of the doctrine that though a mortgage of non-existent property is inoperative as a conveyance, it is operative as an executory agreement which attaches to the property the moment it is acquired and in equity transfers the beneficial interest to the mortgagee without any new act done by the mortgagor to confirm the mortgage.

The leading case further decides that in the case of book-debts, as in the cases of choses in action, generally, intimation of the assignees' right must be made to the debtor or obligee in order to make it complete, for that is the only possession which he can attain so long as the debt is unpaid, and is sufficient to take it out of the order and disposition of the assignor. For an instance of the application of this principle, see *Puniuthavelu* v. *Bhasyam Ayyangar*, I. L. R. 25 Mad. 406.